91-1596

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

REUBEN STURMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Is 18 U.S.C. § 3505 – which exempts one class of witnesses against the accused from testifying in open court and from being subjected to cross-examination, and instead allows the government to offer the witnesses' testimony in the form of affidavits prepared *ex parte* and in anticipation of trial – unconstitutional under the Confrontation Clause of the Sixth Amendment?

II. Is a claim that the Department of Justice violated a citizen's rights under the Fourth and Fifth Amendments by submitting knowing or reckless falsehoods about that citizen to the government of Switzerland for the express purpose of circumventing the proscriptions of an international treaty and inducing the Swiss to release bank records otherwise protected by law from disclosure, sufficiently colorable to entitle that citizen, after indictment, to discover the documents submitted to Swiss authorities containing the alleged falsehoods to support a motion to dismiss the indictment or to suppress evidence?

III. Do the Fifth and Sixth Amendments, and Rule 15 Fed. R. Crim. P., permit the use at a criminal trial of depositions taken in Switzerland, where the official who presided over the deposition proceedings was a Swiss prosecutor who had once unlawfully arrested and interrogated the accused on an unfounded suspicion of a violation of Swiss law, had aided the Justice Department in its investigation of the accused and had previously interviewed one of the witnesses; where the Swiss prosecutor conducted the questioning of the witnesses; and where what was admitted into evidence was not a verbatim transcript of the proceedings, which the Swiss prosecutor forbade, but a mere summary of the proceedings that had been dictated by him?

IV. Is 28 U.S.C. § 455 violated by the failure of a federal judge to recuse himself from presiding over a criminal tax case because of animosity he feels toward the accused for being in the lawful business of distributing sexually oriented

QUESTIONS PRESENTED – Continued

expression where, by his own admission, such animosity was difficult for him to set aside?

V. Is the crime of filing a false tax return under 26 U.S.C. § 7206(1) a lesser-included offense of attempted tax evasion under 26 U.S.C. § 7201 where the affirmative act of evasion charged is the filing of a false tax return, so that upon conviction for both offenses an accused may only be punished once – as the First, Second, Eighth, Ninth and Eleventh Circuits have held – or may a defendant be punished consecutively for both offenses – as the Tenth Circuit, and the Sixth Circuit in this case, have held?

VI. Are provisions of the Bank Secrecy Act and regulations promulgated thereunder unconstitutional under the Self-Incrimination Clause of the Fifth Amendment either on their face or as applied to a case where, in order to comply with the reporting requirements, the accused would have been required to admit his interest in and to divulge detailed information about the very foreign bank accounts for which he was then under active grand jury investigation – the precise question left open by *California Bankers Association v. Shultz*, 416 U.S. 21 (1974)?

VII. Where Congress has determined that a particular course of conduct is not criminal, may the government nonetheless prosecute that conduct by resorting to the "defraud clause" of the general conspiracy statute, 18 U.S.C. § 371?

LIST OF PARTIES

The parties to the proceeding in the Sixth Circuit Court of Appeals were Reuben Sturman, David A. Sturman, Ralph L. Levine and Melvin Kamins as appellants, and the United States as appellee.

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REUBEN STURMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Reuben Sturman, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on October 24, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 951 F.2d 1466, and is set forth at A. 1a.[1] The Court of Appeals order denying petitioner's motion for rehearing is set forth at A. 43a. The oral opinions of the District Court ordering testimony to be taken in Switzerland and admitting summaries of such testimony into evidence are set forth at A. 73a

[1] References to "A." are to the appendix to this petition. References to "T." are to the transcript of pretrial proceedings in the District Court. References to "TT." are to the trial transcript.

(4-25-89) and A. 84a (10-24-89). The numerous unreported written opinions of the District Court and unreported reports and recommendations of a United States magistrate are set forth as follows: Memorandum and Order (11-26-86) (Treaty Submissions) at A. 44a; Order (1-16-87) (Bank Secrecy Act) at A. 55a; Order (10-30-87) (18 U.S.C. § 3505) at A. 57; Memorandum and Order (11-4-87) (Treaty Submissions) at A. 58a; Order (2-9-88) (18 U.S.C. § 3505) at A. 67a; Marginal Order (8-25-88) (Swiss Depositions) at A. 70a; Order (2-9-89) (Swiss Depositions) at A. 71a; Order (3-20-89) (Swiss Depositions) at A. 72a; Order (5-4-89) (Swiss Depositions) at A. 75a; Order (5-5-89) (Swiss Depositions) at A. 78a; Order (8-30-89) (18 U.S.C. § 371) at A. 79a; Memorandum and Order (9-6-89) (18 U.S.C. § 371) at A. 80a; Report and Recommendation (8-21-86) (Treaty Submissions) at A. 88a; Report and Recommendation (10-28-86) (Bank Secrecy Act) at A. 96a.

JURISDICTION

The judgment of the District Court was entered February 15, 1990. A. 130a. The opinion and judgment of the Court of Appeals for the Sixth Circuit was entered October 24, 1991. A. 1a. The Court of Appeals' order denying petitioner's timely petition for rehearing was entered January 8, 1992. A. 43a. This Court has jurisdiction to review the judgment of a United States Court of Appeals entered in this criminal case by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATY, STATUTES AND REGULATIONS INVOLVED

The relevant constitutional provisions, treaty, statutes and regulations involved are reprinted in Appendix T at A. 133a.

STATEMENT OF THE CASE

Introduction

Petitioner was indicted on sixteen counts for tax-related offenses.[2] Count I of the indictment, brought under 18 U.S.C. § 371, charged a conspiracy to defraud the United States by impeding the IRS, where the sole object of the conspiracy was the pre-assessment concealment of petitioner's assets, income and sources of income from the government; Counts II through VI charged petitioner with willfully attempting to evade taxes by filing false tax returns for the calendar years 1978-1982, in violation of 26 U.S.C. § 7201; Counts VII through XI charged petitioner with willfully filing false tax returns during those same years in violation of 26 U.S.C. § 7206(1); Counts XII through XV charged petitioner with willfully failing to comply with specific reporting requirements under the Bank Secrecy Act as required by 31 U.S.C. § 5314 (1982) (formerly 31 U.S.C. § 1121 (1970)) and 31 C.F.R. §§ 103.24 and 103.32, in furtherance of the tax-related charges, in violation of 31 U.S.C. § 5322 (1982) (formerly 31 U.S.C. § 1059 (1970)); and Count XVI charged petitioner with obstructing justice by destroying, concealing and suppressing corporate records subject to grand jury subpoena, in violation of 18 U.S.C. §§ 2 and 1503. Following a jury trial, petitioner was convicted on all counts and was sentenced to ten years' imprisonment, fined $2,460,000 and ordered to pay costs with one of his co-defendants totalling $73,651.55. A. 130a.

Facts

A. Petitioner Is Denied Discovery Of A Treaty Request Made By The Department Of Justice For Swiss Assistance In Its Investigation Of Him.

The indictment was the culmination of an intense grand jury investigation of petitioner for tax-related offenses that

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[2] The original indictment issued on June 27, 1985, and the superseding indictment was returned on June 25, 1987. All references in the text to "the indictment" refer to the superseding indictment.

began in 1978 on the heels of his acquittal on federal obscenity charges. TT. at 1903-04, 1928-29. In December 1981, as part of its tax investigation, the Justice Department sought to obtain records of Swiss bank accounts it believed belonged to petitioner, and turned to the one treaty which normally would provide an avenue for enlisting Swiss assistance in a criminal investigation – the Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, United States-Swiss Confederation, 27 U.S.T. 2019, T.I.A.S. No. 8302 (hereinafter Treaty or Mutual Assistance Treaty). A. 134a. The Mutual Assistance Treaty, however, expressly disallows assistance in tax investigations. *Id.*, Ch. 1, Art. 2 ¶ 1 c(5), 27 U.S.T. at 2026-27. A. 135a.[3] Only one precisely drawn exception exists to this blanket denial of assistance in tax investigations: the target of the investigation must be in the upper echelons of, or be a knowing and significant participant in, important and illegal activities of an "organized criminal group." *Id.*, Ch. 2, Art. 6 ¶ 2; Art. 7 ¶ 2, 27 U.S.T. at 2031-33. A. 137a-139a. "Organized criminal group" is specially defined by the Treaty as a group engaged in illegal activities which systematically employs violence and other means of intimidation to protect its operations, and which strives to corrupt politics or comparable institutions. *Id.*, Art. 6 ¶ 3, 27 U.S.T. at 2031-32. A. 137a-138a.

In its efforts to obtain assistance from the Swiss in its investigation of petitioner, the Justice Department invoked this narrow, organized crime exception to the Treaty by forwarding a series of written submissions to the Swiss which contained information and allegations about petitioner. As a result of these submissions, the Swiss agreed to turn over voluminous bank records it otherwise would have held in the strictest confidence. These records were ultimately used

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[3] This provision was specifically negotiated in recognition of the sanctity with which the Swiss regard an individual's right to privacy in banking relations. *See* Ellis & Pisani, *The United States Treaties On Mutual Assistance in Criminal Matters: A Comparative Analysis*, 19 Int'l Law. 189 (1985).

against petitioner at trial and formed the cornerstone of the government's entire case.

From the moment he learned, by mere happenstance, that his government had accused him of organized crime involvement, petitioner began a relentless effort to discover the contents of the Treaty submissions – for it was petitioner's unwavering contention that he had never been involved in organized crime, much less in an "organized criminal group" as defined by the Treaty, and that his government, which had been scrutinizing him and his business for years, knew this. Indeed, the government had issued official reports as early as 1977 and as recently as 1986, which petitioner forcefully contended supported his claim that the government knew he was not a member of or involved in an organized criminal group.[4]

In the District Court, petitioner moved for discovery of the submissions and an evidentiary hearing, and later moved for dismissal of the indictment or suppression of the evidence, on the ground that the government's conduct violated his Fourth and Fifth Amendment rights. In support of these claims petitioner relied not only on the three government reports, but upon his own affidavit which testified to the fact that he had never been involved in organized crime.

While the magistrate to whom petitioner's motion for discovery was referred recommended petitioner be given full discovery of the submissions and an opportunity to create an evidentiary record, A. 88a, the District Court disagreed, holding that petitioner had no right to discover what his government had said about him, was not entitled to an evidentiary hearing, and in any event, had suffered no constitutional injury as a result of the government's asserted misconduct. A. 44a, 58a.

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[4] Specifically, he relied upon: (1) United States Department of Justice Report, "Organized Crime Involvement in Pornography" (June 1977); (2) Report of President's Commission on Organized Crime, "THE IMPACT: Organized Crime Today" (April 1986); and (3) Attorney General's Commission on Pornography, "Final Report" (July 1986).

On appeal, the Sixth Circuit not only agreed with those conclusions by the District Court, but it went further. A. 26a-31a. The appellate court reviewed the Treaty submissions *in camera*, and simply by reading them reached the factual conclusion "that the documents contain no serious misrepresentations concerning the defendant," A. 30a, despite petitioner's longstanding plea that if only he were given notice of the allegations in the submissions and an opportunity to contest them he would prove their utter falsity.

B. The Government Uses *Ex Parte* Affidavits, Prepared In Anticipation Of Trial, To Provide Testimony Crucial To Its Prosecution.

In 1984, Congress passed legislation which exempts a certain class of witnesses in federal criminal trials from providing their testimony in open court, and instead permits the prosecution to provide such witnesses' testimony through *ex parte* affidavits prepared in anticipation of trial. Specifically, when Congress adopted 18 U.S.C. § 3505, A. 144a, it disposed of the historical requirement of calling a live witness to testify about the identity, creation, maintenance, authenticity and trustworthiness of foreign business records, and instead declared that such crucial testimony could be provided by means of an affidavit or "certification."

Section 3505 was expeditiously put to use by the government in this case. In anticipation of trial, the government had procured *ex parte* affidavits from key government witnesses – foreign bank officials – and, through these affidavits, massive quantities of records from seven foreign banks were admitted at trial. There can be no question that these records went to the very heart of the government's case against petitioner.

Completely dismissing petitioner's claims that his Sixth Amendment right to confront witnesses against him is obliterated when *ex parte* affidavits are used as a substitute for live testimony, the District Court ruled that the bank records could be admitted into evidence. A. 57a, 67a; TT. at 1129, 1132.

The Court of Appeals affirmed. It reasoned that because § 3505 creates "an exception to the hearsay rule for foreign

business documents, . . . the requirements of the Confrontation Clause are automatically satisfied." A. 41a.

C. Summaries Of Overseas Depositions Fashioned By A Biased Swiss Prosecutor Who Presided Over Them Are Admitted Into Evidence.[5]

Prior to 1975, the use of deposition testimony in most criminal trials was simply forbidden.[6] However, in 1975, Rule 15, Fed. R. Crim. P., was amended to permit the taking of deposition testimony in "exceptional circumstances" when it would serve the "interest of justice," "provided . . . the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself." Fed. R. Crim. P. 15(a), (d)(2); A. 152a.

Shortly after the indictment issued in this case, the government requested permission to take depositions in Zurich, Switzerland of several Swiss bank officials. Arguing that Rule 15 was applicable, the government maintained that this testimony was crucial to its prosecution, and that without it, the prosecution would be severely handicapped. T. 12-12-18 at 8-10, 24-27. Over defense objections, the District Court ordered the taking of the Swiss depositions, A. 70a, 75a, 78a, which were then conducted in Zurich, Switzerland in June 1989.

It was evident from the outset of the proceedings, however, that the manner and scope of examination and cross-examination of these witnesses would not even remotely resemble a trial. For, rather than a neutral magistrate presiding over the depositions, the District Attorney of Zurich,

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[5] For a more complete statement of the facts pertinent hereto, please refer to the Petition for a Writ of Certiorari filed by one of petitioner's co-defendants in *David A. Sturman v. United States*, Docket No. 91-1367 (filed Feb. 26, 1992).

[6] Deposition testimony was permitted in organized crime trials only a few years earlier. *See* Organized Crime Control Act of 1970, 84 Stat. 922, 934; 18 U.S.C. § 3503.

Switzerland – a prosecutor who had demonstrated bias against petitioner – controlled the deposition proceedings. In January 1984, at the instigation of the Justice Department, it was District Attorney Benedikt Holdener, the presiding official at the depositions, who had ordered the unlawful arrest and detention of petitioner in Zurich, and had personally interrogated him on suspicion that he was going to use a false passport. TT. 4217. Upon learning that petitioner had done absolutely nothing wrong, Mr. Holdener had released petitioner with a begrudging apology, acknowledging there had been no basis for petitioner's arrest. TT. 4217-18.

In addition, District Attorney Holdener had actively aided the United States in its investigation and prosecution of petitioner in this very case. TT. 4218. He had also unilaterally interviewed at least one of the witnesses to be deposed as part of his investigation, and had aided in resisting petitioner's efforts, made through Swiss channels, to discover the Justice Department's Treaty submissions. TT. 4467. In short, District Attorney Holdener had a vested interest in the outcome of petitioner's prosecution. Nonetheless, Mr. Holdener overruled defense requests to recuse him.

District Attorney Holdener's subsequent decisions and actions even further differentiated the deposition proceedings from a trial. As an initial matter, the entire proceedings were conducted in German with English translations provided by Mr. Holdener's interpreter. Witnesses were not placed under oath, but were merely warned of the Swiss penalties for false statements. TT. 4220. District Attorney Holdener conducted the examination by posing questions he felt were relevant or rephrasing questions posed by the government attorneys. An exchange between the District Attorney, the witness and sometimes the witness' attorney would then take place, although the interpreter did not always provide complete translations of these interchanges. TT. 4219-23. The witnesses were permitted to consult with their attorneys before responding and frequently did. Defense counsel, too, were required to propose questions to Mr. Holdener rather than being permitted to cross-examine the witnesses personally, and the District

Attorney then decided whether the proposed questions would be asked, and how they would be phrased. TT. 4223-24.

What actually occurred at the Swiss deposition proceedings, however, is not reflected in a contemporaneously made verbatim transcript. Indeed, Mr. Holdener barred the creation of a verbatim transcript, and even threatened to prosecute criminally an official United States court reporter were she to create a stenographic transcript. TT. 4212, 4269-70. The "record" of each deposition instead consisted of the District Attorney's dictations to a Swiss police officer acting as "Recording Clerk," and thus amounted to a summary in German fashioned entirely by Mr. Holdener of the questions, answers, interchanges and objections. TT. 4221-24. After these dictations were complete, and in the absence of the defendants, the witnesses were then given the opportunity to review the summaries and make whatever additions or deletions they desired. TT. 4243.

Over defense objections, English translations of portions of these deposition summaries, which consisted of damaging evidence concerning specific Swiss bank accounts and petitioner's use of those accounts, were read to the jury as substantive evidence in the case. TT. 4430-91.

The Court of Appeals determined that no error had been committed. In the court's view, although the deposition proceedings did not resemble a trial in the United States, the procedure used "substantially compl[ied]" with Rule 15. A. 22a-23a. That Mr. Holdener was a prosecutor who had once arrested and interrogated petitioner in Zurich and had even been involved in the investigation of this case was simply seen by the Court of Appeals as an unavoidable side effect of conducting depositions overseas. A. 23a.

D. Petitioner Is Charged, Convicted And Punished For Failing To Provide The Government Detailed Information About Foreign Bank Accounts For Which He Was Then Under Active Grand Jury Investigation.

From as early as August 1978 through the issuance of the indictment, petitioner was under active grand jury

investigation for tax-related offenses. The grand jury's investigation focused on petitioner's suspected use of Swiss bank accounts to conceal his assets and evade taxes. (*See* Rosfelder Affidavit at ¶¶ 6-8).

When the indictment issued, petitioner was charged with willfully failing to maintain records and file reports during the calendar years 1979, 1980, 1981 and 1982, as required by specific provisions of the Bank Secrecy Act and related regulations. These provisions would have required petitioner affirmatively to admit his interest in, and to provide detailed information about, the very Swiss bank accounts for which he was then under active grand jury investigation.[7]

Petitioner moved the District Court to dismiss the Bank Secrecy Act charges on the ground that the relevant statutory provisions and regulations were unconstitutional under the Self-Incrimination Clause of the Fifth Amendment, either on their face or as applied – the precise issue reserved by this Court nearly twenty years ago in *California Bankers Association v. Shultz*, 416 U.S. 21, 73, 75 (1974). The District Court rejected petitioner's Fifth Amendment attack. A. 57a, 67a.[8]

The Court of Appeals affirmed, summarily concluding that petitioner had not been subjected "to a real danger of self-incrimination." A. 36a.

E. Consecutive Sentences Are Imposed For The Charges Of Filing False Tax Returns And The Charges of Evading Taxes Through Filing False Tax Returns.

Following petitioner's conviction on all counts, he was sentenced to prison for ten years, and ordered to pay substantial fines, including consecutive fines of $210,000 for the false tax return counts (26 U.S.C. § 7206(1)) covering the years 1978-1982, and $220,000 for the tax evasion counts (26

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[7] *See* 31 U.S.C. § 5314 (1982) (formerly 31 U.S.C. § 1121 (1970)) and 31 C.F.R. §§ 103.24 and 103.32; A. 149a-151a.

[8] *See also* A. 96a (Magistrate's Report and Recommendation).

U.S.C. § 7201) during those same years, where the affirmative act of evasion charged in the indictment was the filing of false tax returns. The District Court denied petitioner's request to enter judgment and conviction only as to the tax evasion counts, rejecting the theory that the false return counts were lesser-included offenses of the tax evasion counts.

The Sixth Circuit affirmed, aligning itself with the Tenth Circuit, and placing itself in direct conflict with the First, Second, Eighth, Ninth and Eleventh Circuit Courts of Appeals.

F. The Trial Judge Reveals An Extrajudicial Bias Against Petitioner.

After four years of pretrial motion practice and over two months of trial, having ruled on numerous important questions of law and having made hundreds of discretionary rulings, and immediately after having sentenced petitioner, the trial judge addressed petitioner, his co-defendants and all their counsel, and disclosed for the first time a personal bias he had had against petitioner because of the nature of his business – the distribution of sexually oriented materials. He disclosed longstanding and strongly held personal feelings and opinions dating back to his years as a practicing attorney which he conceded had not been easy for him to attempt to set aside, although he had *tried* his best to do so. Specifically, the trial judge stated:

> *I have gone out of my way, very frankly, as a judge to separate in my mind the business that the defendants are in from what they are charged with.*
>
> * * *
>
> However, *I have gone out of my way,* and I *think* it reflects in the sentence, *not to tie the business that the defendants are in* because, thus far, it has been determined it is a legal business but not to tie that in with any matter of sentencing.
>
> However, it is this Court's feeling that even thought [sic] the defendants are suffering and have gone

through an ordeal, *I can't help but think that having seen many movies that depicted certain scenes,* that probably the gentleman involved in selling, first of all, it runs through my mind that somebody has to be paid to appear in those scenes.

Quite frankly, *I have to believe that some people who have acted in those scenes have gone through some tremendous pressures of their own.* So I point that out to you because I am sure from listening to the testimony, at least, the business that these gentlemen have been involved in is a very lucrative business, I understand that.

But I just wonder from a social point of view, at least many people that might be involved in order to make these businesses succeed, what their problems have been.

I am just not so aloof from reality to understand *and from having represented some people in the past, my common experience tells me that there are a lot of problems associated with people who help to make their business a success in the end.*

I *had* to say that. *I have tried my best to,* and I *think* I have in keeping that from involving the sentence in this case. I have *tried* to limit it to the tax matters and the conspiracy that was alleged and the other charges in this case *which have nothing to do with – indirectly it may with the businesses – but should not involve my thinking in the sentences.*

And I have involved my best and it was not the easiest thing for me to do, very frankly. Certainly, you gentlemen on voir dire had a problem picking a jury, *that they would not allow that to come into their minds in arriving at a decision in this case.*

* * *

MR. WELLS: I think you are either uninformed or misinformed about the adult business trade. I have been representing people in it for 25 years, and I just tell you that because I am sure you wouldn't

want to continue, if you are uninformed, *but in 25 years I have never seen anybody that I know exploited in the sense that I think you mean it.*

THE COURT: *What about Linda Lovelace?*

MR. WELLS: No, not even close.

THE COURT: *Well, that's a difference in views, Counsel. I have mine and you have yours.*

T. 2-12-90 at 117-20 (emphasis added).

On appeal, petitioner argued that he was entitled to a new trial since the trial judge's statements revealed a bias against him, or at the very least, compelled the conclusion that a reasonable person could not help but question the judge's impartiality, thus requiring recusal under 28 U.S.C. § 455. A. 147a. The Court of Appeals rejected this claim. A. 24a-26a.

REASONS FOR GRANTING THE WRIT

I. AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER 18 U.S.C. § 3505 VIOLATES THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT BECAUSE IT PERMITS AN ACCUSED TO BE TRIED ON THE BASIS OF *EX PARTE* AFFIDAVITS.

As recently as this term, this Court reaffirmed that a fundamental, core guarantee of the Confrontation Clause of the Sixth Amendment and, indeed, the principal purpose for its adoption, is its protection against trial by *ex parte* affidavit. *White v. Illinois*, ___ U.S. ___, 112 S. Ct. 736 (1992); *id.* at 744-48 (Thomas, J., concurring in part and concurring in the judgment); *see also Maryland v. Craig*, ___ U.S. ___, 110 S. Ct. 3157, 3166 (1990); *California v. Green*, 399 U.S. 149, 156-58 (1970); *Dowdell v. United States*, 221 U.S. 325, 330 (1911); *Mattox v. United States*, 156 U.S. 237, 242-43 (1895).

Yet in this case, the government vigorously fought for and succeeded in obtaining a trial by affidavit. Here, some of the most important witnesses against the petitioner gave their testimony in the form of *ex parte* affidavits prepared in

anticipation of trial for the precise purpose of substituting for live testimony.

The government accomplished this result by relying on 18 U.S.C. § 3505, a radical piece of legislation enacted by Congress in 1984. Section 3505 permits the government in a criminal case to use "certificates of authenticity" – affidavits – to provide crucial testimony relating to the identity, creation, maintenance, authenticity and trustworthiness of foreign business records.[9] A. 144a. Thus, Congress has exempted one specific class of witnesses who testify at criminal trials – those who are called to provide the critical foundation testimony required to gain admission into evidence of foreign business records – from the historical requirement of testifying live, subject to cross-examination, and has instead determined they may give their testimony in affidavits.[10]

In this case, the government collected twelve affidavits and one transcript of an interview containing testimony about

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[9] Section 3505 provides in pertinent part:

> (a)(1) In a criminal proceeding in a court of the United States, a foreign record of regularly conducted activity, or a copy of such record, shall not be excluded as evidence by the hearsay rule if a foreign certification attests that –
>
> > (A) such record was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters;
> >
> > (B) such record was kept in the course of a regularly conducted business activity;
> >
> > (C) the business activity made such a record as a regular practice; and
> >
> > (D) if such record is not the original, such record is a duplicate of the original;
>
> unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.
>
> * * *

[10] Ironically, § 3505 is not applicable to civil cases, where litigants have no Sixth Amendment guarantees.

records from seven foreign banks. All were obtained *ex parte* and in anticipation of petitioner's trial. Rejecting petitioner's Sixth Amendment challenge to § 3505, the District Court permitted the government to use these affidavits to establish critical facts necessary to its prosecution. A. 57a, 67a; TT. at 1129, 1132. And, on the basis of such affidavit testimony, mountains of foreign bank records – the very heart of the government's case against petitioner – were admitted into evidence.

Like the District Court, the Court of Appeals rejected petitioner's argument that § 3505 is unconstitutional under the Confrontation Clause. In the Court of Appeals' view, § 3505 "automatically satisfie[s]" the Confrontation Clause because it "establishes an exception to the hearsay rule for foreign business documents." A. 41a. What the Court of Appeals failed to understand is that § 3505 does no such thing, since an exception to the hearsay rule for business documents, whether domestic or foreign, long predated § 3505. *See* Fed. R. Evid. 803(6). What § 3505 actually does is eliminate the historical requirement of calling a live witness to provide essential foundation testimony. Thus, by equating § 3505 with a mere hearsay exception, the Court of Appeals failed even to acknowledge the constitutional significance and ramifications of permitting *ex parte* affidavits to substitute in a criminal trial for live testimony.

What the court below sanctioned is no different than allowing affidavits to be used to establish all of the foundational facts required to gain admission of a murder weapon into evidence. Nor, for that matter, does it differ from permitting eyewitness identification of the accused as the perpetrator of the crime to be given at trial by means of an affidavit. Here, the testimony that was given by affidavit was absolutely essential to a successful prosecution, for without it the government could never have obtained admission into evidence of the foreign bank records upon which its entire case was centered.

On its face, § 3505 simply cannot be reconciled with this Court's consistent recognition that the Confrontation Clause prohibits trial by *ex parte* affidavit. *White v. Illinois, supra;*

Maryland v. Craig, supra; California v. Green, supra; Dowdell, supra; Mattox, supra. Indeed, § 3505 cannot survive even the narrowest reading of the Confrontation Clause, the one unsuccessfully advanced by the United States itself as *amicus curiae* in *White v. Illinois:* "[T]he Confrontation Clause's limited purpose is to prevent a particular abuse common in 16th and 17th century England: prosecuting a defendant through the presentation of *ex parte* affidavits, without the affiants ever being produced at trial." 112 S. Ct. at 740.

Nor can the constitutional imperative of the Confrontation Clause be brushed aside, as the Court of Appeals seems to suggest, just because a court is able to convince itself that the affidavits, though untested by cross-examination, are nonetheless reliable. A. 41a. As Justice Thomas recently explained, the Confrontation Clause is violated by the use of affidavits, regardless of their reliability.

> Although the historical concern with trial by affidavit and anonymous accusers does reflect concern with the reliability of the evidence against a defendant, *the Clause makes no distinction based on the reliability of the evidence presented. Nor does it seem likely that the drafters of the Sixth Amendment intended to permit a defendant to be tried on the basis of* ***ex parte*** *affidavits found to be reliable.* Cf. U.S. Const., Art. III, § 3 ("No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court").

White v. Illinois, 112 S. Ct. at 746-47 (Thomas, J., concurring) (emphasis added).

Even were reliability a permissible inquiry, however, the entire process by which the affidavits in this case were created and the foreign records obtained and admitted into

evidence is so rife with error and indicia of untrustworthiness, that the records should not have been admitted in any event.[11]

Even more disturbing, however, is that the Sixth Circuit is not alone in its approval of § 3505. Rather, the court below merely followed the lead of the Ninth Circuit in *United States v. Miller*, 830 F.2d 1073, 1077-78 (9th Cir. 1987), *cert. denied*, 485 U.S. 1033 (1988).

The very core of the Confrontation Clause is in serious jeopardy after the Court of Appeals' decision in this case. The issues are too important for this Court to let that decision go unreviewed.

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[11] Among other problems too numerous to recite here, petitioner pointed out to the lower courts the following: (1) the government never even called as a witness the one Justice Department official who received the records and affidavits from the foreign governments in the first instance, thus failing to establish at trial the most basic foundation as to what the records and affidavits were that the government was using, as required by Rules 602 and 901, Fed. R. Evid.; (2) the Swiss certificates of authenticity failed to identify which records they purported to authenticate, nor were they attached to the records even though the certificates stated on their face that records were attached, T. 11-6-87 at 91, 94, 102; T. 11-16-87 at 22, 28, 29; (3) to match records with the affidavit which purportedly authenticated them, the prosecution relied on a numbering system interlineated on the affidavits, which had been created *not* by the various affiants/custodians, but by Swiss District Attorney Holdener, T. 11-16-87 at 41-42; (4) at least three of the six shipments of Swiss bank records received by the Justice Department failed to contain certificates of authenticity that matched the records, T. 11-16-87 at 3-4, 14-22; TT. at 1219-23; (5) the certificate of authenticity relied on by the government for the records from the Algemene Bank in the Netherlands was not provided until two years after records had been received by the Justice Department, T. 11-16-87 at 37; T. 11-6-87 at 70-73; and (6) none of the certificates of authenticity relied on by the government stated that the records at issue were "made . . . by/or from information transmitted by a person with knowledge of those matters" as required by § 3505 itself.

II. IMPORTANT QUESTIONS ARE PRESENTED BY THE DECISION BELOW THAT, EVEN IF THE JUSTICE DEPARTMENT SUBMITTED KNOWING OR RECKLESS FALSEHOODS ABOUT A CITIZEN IN A REQUEST FOR INVESTIGATIVE ASSISTANCE UNDER AN INTERNATIONAL TREATY, THIS DOES NOT GIVE RISE TO CLAIMS UNDER THE FOURTH AND FIFTH AMENDMENTS SUFFICIENTLY COLORABLE TO ENTITLE THAT CITIZEN TO DISCOVER THE TREATY REQUEST.

More than a decade ago, in December of 1981, the United States Department of Justice transmitted to the government of Switzerland in secret a formal request for assistance in which it accused petitioner of being an organized crime figure. The charges against petitioner were made in an effort to convince the Swiss government to produce banking records which it would otherwise not disclose under the carefully drawn provisions of a treaty between the Swiss and the United States. Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, United States-Swiss Confederation, 27 U.S.T. 2019, T.I.A.S. No. 8302 (hereinafter Treaty or Mutual Assistance Treaty); A. 134a. The Swiss, in fact, produced volumes of private banking records in response.

Petitioner contended and continues to maintain that the accusations made to the Swiss are falsehoods – knowingly or recklessly made by the Department of Justice simply to circumvent the proscriptions of the Treaty with the Swiss. *Cf. United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991) (per curiam) (forcible abduction of defendant from his native Mexico to evade 1980 Extradition Treaty between United States and Mexico required dismissal of indictment), *cert. granted*, ___ U.S. ___, 112 S.Ct. 857 (1992). Indeed, upon learning of the existence of the submissions, petitioner began a vigorous but unsuccessful battle to learn what his government specifically communicated to the Swiss about him. To this day, he does not know.

The government's misconduct, petitioner has maintained, raises several serious constitutional claims on his part under

the Fourth and Fifth Amendments. The courts below have disagreed. They have refused him any and all opportunity to discover what his government told the Swiss about him much less any meaningful opportunity to refute the allegations, and they have dismissed his claims of constitutional violation as meritless.

As it stands, this case presents the question left unanswered in *Wayte v. United States*, 470 U.S. 598 (1985): upon a defendant's claim of government misconduct, what is the necessary showing he must make to entitle him to discovery of documents in the government's possession that may support his claim? Moreover, it crystallizes a tension, if not outright conflict, between the court below and the D.C. Circuit in *Cardenas v. Smith*, 733 F.2d 909 (D.C. Cir. 1984), as to whether or not allegations of intentional misconduct on the part of the United States Department of Justice in connection with an international treaty raise colorable constitutional claims.

Under the Mutual Assistance Treaty, Switzerland will honor requests for assistance in criminal investigations including the production of bank records which under Swiss law are imbued with privacy, only upon a showing of reasonable suspicion to believe the target of the request has committed one of a narrow schedule of offenses. The Treaty specifically exempts tax investigations from this schedule. Mutual Assistance Treaty, Ch. 1, Art. 2 ¶ 1(c)(5); A. 135a.

There is a narrowly drawn exception to the Treaty's blanket denial of assistance in the investigation of tax crimes. The Swiss will render assistance in tax investigations only if the United States produces evidence that the target of the investigation is enmeshed in the network and activities of "an organized criminal group." Mutual Assistance Treaty, Art. 6 ¶¶ 2, 3; Art. 7 ¶¶ 2, 3, 27 U.S.T. at 2031-33; A. 137a-139a. Seizing upon this exception, the United States Department of Justice submitted to the Swiss accusations that petitioner was involved in an organized criminal group.

Petitioner moved for discovery of the submissions and an evidentiary hearing, and later moved for dismissal of the indictment or suppression of the evidence on the basis that the

government's misconduct violated his Fourth and Fifth Amendment rights. In support of his constitutional claims, petitioner proffered his own affidavit stating that he had never been involved in organized crime and three government reports supportive of his contention that the government *knew* that petitioner was *not* an organized crime figure. *See supra* note 4.

The United States magistrate who first reviewed petitioner's discovery request recognized that petitioner's allegations of government misconduct gave rise to several colorable constitutional claims meriting discovery of the Treaty submissions and the development of a full record. Accordingly, the magistrate recommended granting petitioner's discovery request. A. 88a-95a.

The District Court overruled the magistrate's recommendations that discovery be granted and later denied petitioner's motion to dismiss the indictment or to suppress evidence without conducting any evidentiary hearing. Essentially, the District Court held that petitioner could present absolutely no defense based on any demonstrable lies or government misconduct, no matter how egregiously false the submissions were.

The Court of Appeals for the Sixth Circuit affirmed.

The record in this case reads like a chapter from Kafka. Petitioner stands tried, convicted and sentenced without ever being informed of what he was specifically supposed to have done. Not only have the District Court and the Court of Appeals refused to allow the petitioner to learn what allegations his government has made about him or to hold an evidentiary hearing with regard to those allegations, but the Court of Appeals has taken it upon itself to decide the truth or falsity of the allegations in the secret submissions. In affirming, the Court of Appeals found: "A review of the submissions to the Swiss government reveals that the documents contain no serious misrepresentations." A. 30a.

This error by the appellate court "is so large and palpable that, like an elephant standing three inches from the viewer's eye, it is at first hard to recognize." *United States v. City of*

Miami, 664 F.2d 435, 451 (5th Cir. 1981) (Gee, J. concurring). It is a complete mystery how a panel of appellate judges sitting in 1991 who were not witnesses to and otherwise have no personal knowledge about events allegedly occurring more than 10 years ago and described in secret submissions written in 1981, can decide the truth or falsity of the facts contained in the submissions by simply reading them, particularly in the face of the petitioner's longstanding plea that if only he were given notice of the allegations in the submissions and an opportunity to contest them he could prove that they are false. Basic notions of due process dictate that, at the very least, petitioner is entitled to discovery of the specific allegations made about him in the submissions and an opportunity to be heard in order to establish his defense.

The rejoinder by both the District Court and the court below has been that any governmental misconduct that petitioner might show in connection with the submissions simply does not present any cognizable constitutional claim. Therefore, the courts held denial of his discovery request was proper.

The courts' holdings cannot be reconciled with *Cardenas v. Smith*, 733 F.2d 909, 919 (D.C. Cir. 1984), however, in which the Court of Appeals for the District of Columbia found that wrongful actions on the part of the United States government in connection with this same treaty raised colorable constitutional claims under the Fourth and Fifth Amendments.

Thus in addition to the important question regarding petitioner's basic discovery rights, this case also presents the important question of whether government misconduct of the kind alleged here violates the Fourth and Fifth Amendments, or, at the very least, raises colorable claims under those constitutional guarantees.

Petitioner contends that the government's misconduct violated his rights to substantive and procedural due process under the Fifth Amendment as well as his Fourth Amendment right to be free from unreasonable searches and seizures of bank records as to which he has a reasonable expectation of privacy.

Specifically, petitioner asserts that when the United States Department of Justice, representing the United States government, knowingly or recklessly makes false representations that one of its citizens is a member of organized crime in a formal submission to a foreign government in order to circumvent an international treaty and induce the foreign country to disgorge otherwise protected information about that citizen, the government is guilty of the kind of governmental misconduct that violates substantive due process. *See Rochin v. California*, 342 U.S. 165 (1952); *United States v. Tsutagawa*, 500 F.2d 420 (9th Cir. 1974); *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974).

Moreover, that misconduct violates petitioner's rights to procedural due process by depriving him of both a liberty interest and a property interest secured by Swiss law, the contract between the bank and its customer, and the Treaty itself, without ever affording petitioner notice or a meaningful opportunity to respond to such charges. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *Paul v. Davis*, 424 U.S. 693 (1976).

Petitioner asserts that his Fourth Amendment rights have also been violated. Indeed, this case presents the question not reached in *United States v. Payner*, 447 U.S. 727, 732 n.4 (1980): does a foreign bank secrecy law that is steeped in an historical and ideological commitment to banking privacy, contains very few exceptions to its privacy guarantee and carries substantial penalties for its violation give rise to a reasonable expectation of privacy implicating Fourth Amendment rights? In *Payner*, the Court concluded that the Bahamian banking secrecy law at issue was so riddled with exceptions that it did not give rise to any reasonable expectations of privacy and, therefore, the Fourth Amendment was not implicated.

The questions presented regarding the petitioner's right to discovery and the constitutional accountability of the United States government for intentional misconduct in connection with an international treaty are commanding and important questions that merit examination by this Court.

III. IMPORTANT QUESTIONS ARE PRESENTED BY THE DECISION OF THE COURT BELOW APPROVING THE USE OF THE SWISS DEPOSITION SUMMARIES.[12]

A. Petitioner's Fifth And Sixth Amendment Rights To Due Process, A Fair Trial, Effective Assistance Of Counsel And Confrontation Were Violated By The Manner In Which The Swiss Depositions Were Conducted.

Early in these proceedings, the government began its quest to take the depositions of witnesses located in Switzerland. The government asserted that these witnesses – all Swiss bank officials – would provide testimony crucial to a successful prosecution, making this an "extraordinary" case within the meaning of Rule 15, Fed. R. Crim. P. Despite defense objections on numerous grounds, the District Court granted the government's motion, A. 70a, and depositions were held in Zurich, Switzerland in June 1989.

It is undisputed that these important depositions were presided over and controlled by the District Attorney for Zurich, Switzerland, Benedikt Holdener, who, in his role as prosecutor, had not only demonstrated bias against petitioner when he arrested him unlawfully at the instigation of the Justice Department, but who had significantly aided the prosecution in its investigation of petitioner in this very case. The District Court and Court of Appeals, however, saw no constitutional problem with this.

Yet, the fact that District Attorney Holdener presided over and controlled the taking of the depositions in the first instance, petitioner maintains, violated his right to an impartial tribunal protected by the Due Process Clause of the Fifth Amendment. *See generally Tumey v. Ohio*, 273 U.S. 510, 532 (1927); *In re Murchison*, 349 U.S. 133 (1955); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

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[12] Petitioner also adopts by reference the arguments raised by his co-defendant in *David A. Sturman v. United States*, Docket No. 91-1367 (filed Feb. 26, 1992).

It is further undisputed that District Attorney Holdener barred the making of a verbatim transcript, exercised complete control over what was reflected in the record of the depositions and personally conducted all the examination and cross-examination of the witnesses. Neither the District Court nor the Court of Appeals, however, was troubled by the admission into evidence of District Attorney Holdener's summaries as substantive evidence in a felony trial. Yet these circumstances, petitioner submits, clearly violated his rights to due process, a fair trial, effective assistance of counsel and confrontation protected by the Fifth and Sixth Amendments.

This Court's review is needed to address the important constitutional questions presented and to clarify that the Fifth and Sixth Amendments cannot and do not tolerate what occurred here.

B. The Decision Below Sanctions Flagrant Departures From The Mandatory Provisions Of Rule 15.

Rule 15 permits the taking and filing of depositions in criminal cases only under "exceptional circumstances," and only when the "interest of justice" is furthered. Fed. R. Crim. P. 15(a); A. 152a. Rule 15 requires, however, that "deposition[s] shall be taken and filed in the manner provided in civil actions . . . *provided* . . . the scope and manner of examination and cross-examination *shall be such as would be allowed in the trial itself.*" Rule 15(d)(2) (emphasis added). Thus, the principal inquiry in determining whether a deposition may be entered into evidence at trial is whether "the manner and scope of examination and cross-examination" are the same as "would be allowed in the trial itself." Prefaced by the word "shall," this proviso is not dispensable – it is mandatory.

Here, the Court of Appeals concedes, as did the government, that the Swiss depositions did not comport with Rule 15's proviso: the proceedings were not presided over by an impartial tribunal, as would be required in the trial itself; witnesses were not placed under oath, as would be required at trial; verbatim transcripts were barred, unlike a criminal trial;

not only was the manner and scope of cross-examination not the same as in the trial itself, but cross-examination, as we know it, was not permitted at all; witnesses were permitted to confer with their attorneys before answering, which would never be permissible at trial; and witnesses were allowed to make additions and corrections to the summaries after the fact and *ex parte*, unlike at a trial.

The Court of Appeals has decided, however, that foreign depositions which concededly fail to comply with Rule 15's requirements are nonetheless admissible into evidence, provided only that the deposition proceedings were not " 'so incompatible with our fundamental principles of fairness or so prone to inaccuracy or bias as to render the testimony inherently unreliable . . . . ' " A. 22a (quoting and adopting dicta in *United States v. Salim*, 855 F.2d 944, 953 (2d Cir. 1988)).[13]

What occurred in this case are not minor deviations from Rule 15's requirements, but flagrant departures from mandatory procedures. Unless this Court grants review, the Court of Appeals' decision will simply serve as further justification for the government and lower courts to ignore the limitations on taking deposition testimony, imposed not only by the Fifth and Sixth Amendments, but by Rule 15 as well.

IV. THE COURT OF APPEALS HAS EFFECTIVELY REENACTED A SUBJECTIVE STANDARD FOR RECUSAL OF FEDERAL JUDGES IN DIRECT CONTRAVENTION OF 28 U.S.C. § 455 AND THIS COURT'S PRECEDENTS.

Prior to 1974, the federal statute governing a judge's responsibility to recuse himself – 28 U.S.C. § 455 – permitted a judge to decide if it were " 'improper, *in his opinion*, for him to sit on the trial, appeal, or other proceeding therein.' " *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 108 S. Ct. 2194, 2201 n.7 (1988) (quoting 62 Stat. 908) (emphasis added). In 1974, however, Congress replaced this

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[13] Even under that standard, the Court of Appeals should not have sanctioned the deposition summaries being admitted into evidence.

"*subjective* 'in his opinion' standard with an *objective* test," *id.* (emphasis added), thus mandating recusal in certain circumstances regardless of the judge's personal opinion. In particular, § 455 now provides that:

> (a) Any justice, judge, or magistrate of the United States *shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.*
>
> (b) *He shall also recuse himself . . .*
>
> (1) Where he has a *personal bias or prejudice concerning a party . . .*
>
> * * *

28 U.S.C. § 455(a), (b)(1) (emphasis added); A. 147a.

Under this amended version, it is entirely irrelevant that a judge may subjectively believe he can remain impartial. Rather, the only relevant inquiry is whether a judge has a personal bias "concerning a party" under § 455(b)(1), or whether "there is a reasonable factual basis for doubting the judge's impartiality . . . " under § 455(a). H.R. Rep. No. 1453, 93d Cong., 2d Sess. 4, *reprinted in* 1974 U.S. Code Cong. & Admin. News. Only under these circumstances can Congress' intent "to promote public confidence in the integrity of the judicial process . . . " be advanced. *Liljeberg*, 108 S. Ct. at 2202; *see also id.* at 2208 (Rehnquist, J., dissenting).

In this case, the district judge revealed longstanding and strongly held personal and extrajudicial feelings and opinions against petitioner because of the nature of petitioner's business. In fact, the petitioner's business – the distribution of books, magazines and videotapes – is protected by the First Amendment. The judge's comments reveal his awareness that the nature of petitioner's business should not "involve [his] thinking," "because, thus far, it has been determined it is a legal business . . . . " T. 2-12-90 at 117. Yet the trial judge's comments likewise reveal his own uncertainty as to whether he was able to set aside his feelings about petitioner stemming from what the judge assumed to be the content of material he thought petitioner produced and disseminated – assumptions which had as their basis, *not* the charges or

evidence in the case, but the judge's own personal experiences. This in itself would cause a reasonable person to question the trial judge's impartiality. *Cf. Dawson v. Delaware*, 60 U.S.L.W. 4197 (March 9, 1992) (Court recognized that, under the First Amendment, it was improper for the jury, at sentencing, to consider defendant's association with the Aryan Brotherhood since his association was wholly unrelated to the issues to be decided).

The Court of Appeals, however, concluded otherwise. While the court quoted directly from § 455, in reality it merely paid lip service to the important decision Congress made when it amended § 455. A. 25a. For rather than applying an objective reasonable person test in reviewing the trial judge's comments, the Court of Appeals decided it would "take at face value [the trial judge's] assertion that he set his feelings about the defendants' business aside." A. 25a. The court's attempt to revive the "subjective 'in his opinion' standard" – expressly discarded by Congress in 1974 – should be reason enough for this Court to grant review in this case.

In addition, however, the Court of Appeals imposed upon petitioner the burden of proving actual partiality on the part of the judge – a burden clearly improper under § 455(a) – as well as actual prejudice in the form of adverse, reversible rulings traceable to such partiality. A. 25a-26a. This standard for recusal is not only nearly impossible to meet under any circumstances, but if left intact, it would render Congress' amendment to § 455 ineffectual.

Accordingly, this Court should issue a writ to address these important issues and the Court of Appeals' clear departure from the law.

V. THIS COURT SHOULD RESOLVE A CONFLICT AMONG THE CIRCUITS AS TO WHETHER A CHARGE OF FILING A FALSE TAX RETURN UNDER 26 U.S.C. § 7206(1) IS A LESSER-INCLUDED OFFENSE OF A CHARGE OF ATTEMPTED TAX EVASION BY FILING A FALSE RETURN UNDER 26 U.S.C. § 7201.

This case also directly presents this Court with the opportunity to resolve a conflict among the Circuits as to whether a

charge of filing a false tax return under 26 U.S.C. § 7206(1) for a specific year in question is a lesser-included offense of a charge of attempting to evade taxes under 26 U.S.C. § 7201 for that same year, where the affirmative act of evasion charged in the indictment is the filing of a false tax return. A. 145a-146a.

In this case, the Sixth Circuit, following the lead of the Tenth Circuit in *United States v. Franks*, 723 F.2d 1482, 1486 (10th Cir. 1983), *cert. denied*, 469 U.S. 817 (1984), held that § 7206(1) offenses are not necessarily lesser-included offenses of § 7201 offenses premised on filing false tax returns, and accordingly upheld the imposition of consecutive fines. A. 37a. The Sixth and Tenth Circuits are thus in direct conflict with the First, Second, Eighth, Ninth and Eleventh Circuits, which have recognized that convictions under § 7206(1) are lesser-included offenses of § 7201 offenses premised on the filing of false tax returns. *United States v. Kaiser*, 893 F.2d 1300, 1305-07 (11th Cir. 1990); *United States v. Citron*, 783 F.2d 307, 312 (2d Cir. 1986), *following remand*, 853 F.2d 1055 (2d Cir. 1988); *United States v. White*, 417 F.2d 89, 93-94 (2d Cir. 1969), *cert. denied*, 397 U.S. 912 (1970); *United States v. Pulawa*, 532 F.2d 1301, 1302 (9th Cir. 1976); *United States v. Lodwick*, 410 F.2d 1202, 1206 (8th Cir.), *cert. denied*, 396 U.S. 841 (1969); *Gaunt v. United States*, 184 F.2d 284, 290 (1st Cir. 1950), *cert. denied*, 340 U.S. 917 (1951).

VI. THIS IS AN IDEAL CASE TO CONSIDER THE ISSUE RESERVED BY THIS COURT NEARLY TWENTY YEARS AGO IN *CALIFORNIA BANKERS ASSOCIATION V. SHULTZ*, 416 U.S. 21 (1974): WHETHER PROVISIONS OF THE BANK SECRECY ACT AND REGULATIONS PROMULGATED THEREUNDER, ARE UNCONSTITUTIONAL UNDER THE SELF-INCRIMINATION CLAUSE OF THE FIFTH AMENDMENT.

In *California Bankers Association v. Shultz*, 416 U.S. 21, 73, 75 (1974), this Court declined to decide whether reporting

requirements of the Bank Secrecy Act, 31 U.S.C. §§ 5311, *et seq.*, and related regulations, are unconstitutional under the Self-Incrimination Clause of the Fifth Amendment, since the Fifth Amendment challenge there, raised prior to enforcement, was premature. Having waited for nearly two decades to address this question, the facts in this case – which established that petitioner was charged with failing affirmatively to admit having an interest in and to provide detailed information about Swiss bank accounts during the same years he was under active grand jury investigation relating to his use of those bank accounts – beckon this Court finally to resolve this important question.

VII. AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER THE "DEFRAUD CLAUSE" OF 18 U.S.C. § 371 MAY BE USED TO PROSECUTE AN AGREEMENT TO ENGAGE IN CONDUCT WHICH CONGRESS HAS DETERMINED IS NOT CRIMINAL.

This case also presents the important question of whether the "defraud clause" of the general conspiracy statute – 18 U.S.C. § 371 – can be interpreted to allow the government to prosecute a conspiracy premised upon conduct which has been determined by Congress not to be criminal. A. 143a.

In this case, petitioner was charged in Count I of the indictment with conspiring to defraud the government by impeding the IRS. The *sole object* of the conspiracy, as set forth in the indictment and bills of particulars, was the pre-assessment concealment of petitioner's assets, income and sources of income – conduct which Congress, in amending 26 U.S.C. § 7206(4) in 1954, determined was not criminal conduct.[14]

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[14] *See United States v. Minarik*, 875 F.2d 1186, 1194-95 (6th Cir. 1989) (in amending § 7206(4), Congress decided that a person's duty not to conceal assets from the government does not arise until after levy has been authorized); *United States v. Swarthout*, 420 F.2d 831, 835 (6th Cir. 1970) (same).

On this basis, petitioner moved to have Count I dismissed for failing to charge an offense. The District Court denied this motion, and the Court of Appeals affirmed.

Certiorari should be granted to address this important issue regarding the proper reach of § 371.[15]

CONCLUSION

For all the foregoing reasons, petitioner respectfully urges this Court to grant his petition for a writ of certiorari.

Respectfully submitted,

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[15] This issue has also been raised by two of petitioner's co-defendants in a separately filed petition for a writ of certiorari. *See Ralph Levine, et al. v. United States*, Docket No. 91-1533 (filed March 24, 1992).

APPENDICES

APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION

Pursuant to Sixth Circuit Rule 24

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 90-3147/3148/3151/3750

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID A. STURMAN (90-3147); RALPH L. LEVINE 90-3148); REUBEN STURMAN (90-3151); and MELVIN KAMINSKY (90-3750),
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Ohio

Decided and Filed October 24, 1991

Before: KENNEDY and MILBURN, Circuit Judges; and WILHOIT, District Judge.*

KENNEDY, Circuit Judge.

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* The Honorable Henry R. Wilhoit, Jr., United States District Court for the Eastern District of Kentucky, sitting by designation.

I. STATEMENT OF FACTS

On June 25, 1987, the defendants were charged with one count of conspiring to defraud the United States by impeding governmental functions. Reuben Sturman was also indicted on counts of attempted tax evasion, filing false income tax returns, willfully failing to maintain records and file reports, and one count of endeavoring to obstruct justice. Following their conviction, Reuben Sturman was sentenced to 10 years imprisonment, fined approximately $2.5 million, and ordered to pay prosecution costs. The other defendants were sentenced to shorter terms and fined lesser amounts.

Reuben Sturman engaged in the production, sale, and distribution of sexually explicit books and tapes. Some of the individual businesses ran "peep booths" which played sexually explicit videos. David Sturman, Reuben Sturman's son, was responsible for his father's businesses in the San Francisco area. Ralph Levine ran the businesses in Nevada and Melvin Kaminsky managed Reuben Sturman's principal business, Sovereign News Company.

The defendants, led by Reuben Sturman, created 150 domestic corporations beginning in the 1960s. Reuben Sturman also formed five foreign corporations in countries following strict "corporate secrecy" policies. The testimony of numerous witnesses revealed that the named shareholders and nominees in these corporations were often fictitious. In other cases, real people were listed as shareholders, but their names and signatures had been used without their knowledge or permission. The prosecution proved that, in fact, Reuben Sturman was the beneficial owner of most of the corporations.

The defendants used the corporations to conceal income. They transferred money between corporations in ways that made tracing income and expenses difficult. The defendants also skimmed money from some of the adult entertainment businesses. This money was then

used to pay personal expenses or was transferred and deposited in Swiss bank accounts. These bank accounts were opened in 1974, as stated by Reuben Sturman, to "conceal his money" and "avoid taxes." (Testimony of Walter Butti, Alfred Graf and James Olsafsky.) The transfers to Switzerland were accomplished through a series of transactions involving both the foreign and domestic corporations.

Reuben Sturman took a variety of steps to conceal his activities from the authorities. A federal investigation in 1975 forced him to begin hiding documents. In 1979, following the issuance of subpoenas calling for various records, Reuben Sturman destroyed or hid many of the requested records. He took similar actions in response to a 1982 grand jury subpoena.

Tax records filed during the period of the conspiracy contained numerous false statements and inaccuracies. Reuben Sturman failed to report his ownership in the domestic and foreign corporations or his signature authority over foreign bank accounts. His tax returns for 1978-1982 underreported $2,735,713 in individual income. The other defendants also failed to report their signature authority in foreign accounts.

II. DENIAL OF DEFENDANTS' MOTIONS TO DISMISS COUNT I

All defendants filed motions to dismiss Count I which charged that the defendants,

> did unlawfully, knowingly and willfully conspire, combine, confederate and agree together and with each other to defraud the United States of America by hampering, hindering, impeding, impairing, obstructing and defeating the lawful Governmental functions of the Internal Revenue Service of the

> Treasury Department of the United States in the ascertainment, computation, assessment and collection of income taxes [in violation of 18 U.S.C. § 371.]

Defendants based their motions on this Court's decision in *United States v. Minarik*, 875 F.2d 1186 (6th Cir. 1989), which held that conspiracy to commit an offense and conspiracy to defraud, under 18 U.S.C. § 371, were two separate crimes. The District Court denied the defendants' motions holding that *Minarik* was inapplicable to the conspiracy charged in this case. We agree.

Count I of the indictment is based on 18 U.S.C. § 371 (1984) which states,

> [i]f two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Count I charges the defendants under the defraud clause of the statute. This type of conspiracy is generally known as a "Klein" conspiracy. *See United States v. Klein*, 247 F.2d 908 (2d Cir. 1957), *cert. denied*, 355 U.S. 924 (1958). In *Klein*, several persons were charged with defrauding the United States by impeding and obstructing the lawful functions of the Treasury Department and concealing the nature of their business activities and source of income. As in this case, "the indictment [was] framed to make a general charge of impeding and obstrucing the Treasury Department . . . [with more specific allegations] as particular instances, rather than as substitute and complete allegations of the substantive crime itself." *Klein*, 247 F.2d at 916. The conspiracy in

Klein also involved a large number of domestic and foreign corporations, and multiple violations of the tax laws.

In *Minarik*, 875 F.2d at 1186, this Court addressed the two clauses of the conspiracy statute. One of the defendants in that case, Aline Campbell, had been issued three tax assessments for a total demand of $108,788.15. Campbell responded that she did not owe a tax. Shortly after the tax assessment, Campbell, together with her friend Robert Minarik, arranged for the sale of a house Campbell owned. The $47,500 payment was made in the form of seven checks for $4,900 and one check for $3,732.18. The buyer assumed a mortgage for the balance. When Campbell cashed two of the checks at the same bank, the IRS was contacted. The IRS agents obtained a warrant to search Campbell's car because she had attempted to avoid the Bank Secrecy Act which requires the filing of an IRS report for any transaction over $10,000. The defendants were charged with conspiring to defraud the government by concealing the nature of and income from Campbell's business affairs in violation of 18 U.S.C. § 371. The indictment did not make clear what function of the Treasury Department the defendants were impeding and the government changed its theory of the case throughout the indictment process and trial. The defendants could have been charged properly under section 7206(4) of the Internal Revenue Code which makes it a felony to conceal any goods or commodities on which a tax or levy has been imposed.

This Court held that defendants could not be charged under the defraud clause but convicted on evidence which suports the offense clause. In *Minarik*, the Court interpreted section 371 finding:

> the "offense" and "defraud" clauses as applied to the facts of this case are mutually exclusive, and the facts proved constitute only a conspiracy under

> the offense clause to violate 26 U.S.C. § 7206(4)
> . . . .

875 F.2d at 1187. The Court concluded that when Congress creates a specific offense out of conduct which was previously criminalized only if it took the shape of a conspiracy to defraud the United States, the court should require that a criminal conspiracy regarding that conduct be brought exclusively under the offense clause. *Id.* at 1194. Thus, if the offense clause covers an act or offense, a person cannot alternatively be convicted under the broad defraud clause. This rule comes into effect most often when a Congressional statute closely defines the duties a defendant is accused of violating. The Court reasoned that requiring an indictment to charge a defendant with conspiracy to commit a specific crime reduces the uncertainty in a case by defining up front the alleged crime.

Defendants here argue that the conduct alleged in Count I amounted to a violation of either 26 U.S.C. §§ 7206(1) or 7206(4) and that the conspiracy should have been charged under the offense clause of section 371. We disagree. The conspiracy alleged and proven here was broader than a violation of a specific statute.

This Court, in *Minarik*, noted that the holding in the case referred to the offense and defraud clauses "as applied to the facts in this case." 875 F.2d at 1187. The facts in *Minarik* and this case are distinguishable. Reuben Sturman set up a complex system of foreign and domestic organizations, transactions among the corporations, and foreign bank accounts to prevent the IRS from performing its auditing and assessment functions. Evidence shows that he committed a wide variety of income tax violations and engaged in numerous acts to conceal income. This large conspiracy involved many events which were intended to make the IRS impotent. No pro-

vision of the Tax Code covers the totality and scope of the conspiracy. This was not a conspiracy to violate specific provisions of the Tax Code but one to prevent the IRS from ever being able to enforce the Code against the defendants. Only the defraud clause can adequately cover all the nuances of a conspiracy of the magnitude this case addresses. As the Supreme Court had held with respect to specific violations within a conspiracy, "[t]he fact that the events include the filing of false statements does not, in and of itself, make the conspiracy-to-defraud clause of § 371 unavailable to the prosecution." *Dennis v. United States*, 384 U.S. 855, 863-64 (1966). In this case, the prosecution was entitled to indict the defendants under the defraud clause.[1] The broad nature of the conspiracy, and the associated violation of several statutes, distinguishes this case from *Minarik*. In this case, the alleged conduct violates several statutes. A "conspiracy to defraud" charge most clearly covers the conduct when viewed in its entirety.

The chief concern of this Court in *Minarik* was that the government, by constantly changing the prosecution theory, never adequately informed the defendant of the charges against him. In this case, no such changing theories have emerged. The prosecution has presented the case clearly and no confusion as to the charges is evident.

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[1] The government's brief cites four cases in which the Sixth Circuit has affirmed convictions based on the defraud clause. These defendants could also have been charged based on the offense clause. These decisions lend support to limiting *Minarik* to its facts. *See United States v. Jerkins*, 871 F.2d 598 (6th Cir. 1989); *United States v. Shermetaro*, 625 F.2d 104 (6th Cir. 1980); *United States v. Fruehauf Corp.*, 577 F.2d 1038 (6th Cir.), *cert. denied*, 439 U.S. 953 (1978); *United States v. Levinson*, 405 F.2d 971 (6th Cir. 1968), *cert. denied*, 395 U.S. 958 (1969).

III. INSUFFICIENT EVIDENCE CLAIMS OF DAVID STURMAN AND RALPH LEVINE

A. David A. Sturman

David Sturman asserts that the prosecution produced insufficient evidence to support his conviction. He specifically points to a lack of proof evidencing his participation in a conspiracy or of the formation of a willful conspiracy.

A conviction withstands a sufficiency of evidence challenge if

> after viewing the evidence in the light most favorable to the government and drawing all reasonable inferences in the government's favor, the evidence is sufficient to justify a reasonable juror's conclusion that each element of the offense has been established beyond a reasonable doubt . . . .

United States v. Poulos, 895 F.2d 1113, 1117 (6th Cir. 1990) (citations omitted). When attempting to prove an individual's participation in a conspiracy, the prosecution must first establish that a conspiracy existed. This Court stated the elements necessary for proof of conspiracy under 18 U.S.C. § 371 in *United States v. Meyers*, 646 F.2d 1142 (6th Cir. 1981):

> The essential elements of conspiracy are: (1) that the conspiracy described in the indictment was willfully formed, and was existing at or about the time alleged; (2) that the accused willfully became a member of the conspiracy; (3) that one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment, at or about the time and place alleged; and (4) that such overt act was knowingly done in furtherance of some object or purpose of the conspiracy as charged.

Id. at 1143-44. The existence of a conspiracy can be inferred from circumstantial evidence. *United States v.*

Levinson, 405 F.2d 971 (6th Cir. 1968), *cert. denied*, 395 U.S. 958 (1969). Once a conspiracy has been established, the prosecution need only produce slight evidence to implicate the defendant. *Poulos*, 895 F.2d at 1117.

Extensive evidence was submitted at trial to establish the existence of a conspiracy. Evidence against David Sturman included his admission that he had opened two Swiss bank accounts under assumed names, his signature authority over 20 additional accounts under the names of various fictitious persons, his directorship at one of the corporations used to channel money from other businesses, and his failure to report his signature authority over Swiss accounts as required by law. All of these activities were interrelated to his father's overall activities. His father's secretary and accountant were also active in the overall scheme. This evidence is adequate to prove the existence of a conspiracy. The testimony of various witnesses, the signature cards with David Sturman's name, and his own admissions implicate the defendant. The jury reasonably could have inferred from the evidence that David Sturman knew of the conspiracy, willfully became a member of the conspiracy, and participated in the concealment of assets from the IRS. This Court finds that a reasonable jury could find the evidence adequate to implicate the defendant and support his conviction and therefore affirms the District Court findings.

B. Ralph L. Levine

Levine argues there is insufficient evidence of any agreement on his part to become a member of the conspiracy, and that even if he did so agree, it was to a different conspiracy then [*sic*] the one alleged. For this Court to sustain a conviction of conspiracy,

> the defendant must know the purpose of the conspiracy, but not necesarily the full scope thereof,

> the detailed plans, operation, membership, or even the purpose of other members in the conspiracy.

United States v. Shermetaro, 625 F.2d 104, 108 (6th Cir. 1980). Further, the Court is bound by "all reasonable inferences and credibility choices in support of the jury's verdict." *United States v. Hughes*, 895 F.2d 1135, 1140 (6th Cir. 1990) (quoting *United States v. Stull*, 743 F.2d 439, 442 (6th Cir. 1984)).

As Levine concedes, Reuben Sturman conspired to defraud the government by creating numerous and complex means of concealing assets and income. Levine, who acted as a partner to Sturman, ran the Nevada businesses. An employee, Jack Marcum, testified that at least $70,000 in cash from the Nevada businesses went unrecorded every month. Levine failed to report the existence or use of this money and therefore furthered the purpose of the conspiracy. His signature authority and power of attorney on Swiss acounts, his failure to report such authority, and the signing of aliases on the signature cards provides further evidence from which the jury could imply willing membership. Levine argues that any findings that he participated in the conspiracy can only be based on inference piled on inference in violation of *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943). This Court finds the evidence presented adequate to find participation in a conspiracy even without multiplying inferences. A reasonable jury could find the evidence sufficient to convict the defendant.

IV. SINGLE VERSUS MULTIPLE CONSPIRACIES AND JOINDER OF CLAIMS

Levine and David Sturman both contend that the evidence establishes the existence of multiple conspiracies rather than only one large conspiracy. Levine also asserts that the District Court abused its discretion when it denied his motion for severance. The motion, based on Fed-

eral Rules of Criminal Procedure 14, claimed prejudice by the joinder of defendants at trial. Defendants have failed to preserve either of these issues.

At the end of trial, both Levine and David Sturman requested jury instructions on multiple conspiracies. The district judge declined to give the multiple conspiracy instruction and several other instructions requested by the defense. After the jury was instructed, Reuben Sturman's attorney, J. Michael Murray, raised a general objection "to the failure with respect to any of the jury instructions that have not been included." He then mentioned several specific instructions, by number, which he believed expressed a correct statement of law and were necessary to present a balanced statement of the case to the jury and potential defenses. Mr. Murray did not mention, even by number, the instruction addressing multiple conspiracies and gave no distinct reasons for objecting to the court's failure to include the multiple conspiracy instruction.

A general objection to district court jury instructions is insufficient to preserve a specific claim. Fed. R. Crim. P. 30 states:

> No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection.

This rule clearly indicates that a specific objection must be made with regard to charge requests. *See United States v. Friedman*, 854 F.2d 535, 555 (2d Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989); *United States v. Martinez*, 776 F.2d 1481, 1484 (10th Cir. 1985) (holding that the objection "both instructions fit this case and should be given" is inadequate to preserve issue). The defendants in this case have failed to preserve the issue of multiple conspiracies for appeal.

Levine's contention that the District Court abused its discretion by denying his motion for severance is also without merit. Levine made several motions based on Rule 14 of the Federal Rules of Criminal Procedure. Rule 14 allows the trial court to grant a severance if it appears that a defendant is prejudiced by a joinder of offenses or defendants. Levine argued that the evidence against the co-defendants unfairly accrued to him and that no cautionary instruction could eradicate that accrual.

Levine has failed to preserve this claim for appeal. This Court has held that "a severance motion will be deemed waived if it is not renewed at the end of the evidence." *United States v. Swift*, 809 F.2d 320, 323 (6th Cir. 1987). Although Levine argued that he was entitled to a judgment of acquittal under Federal Rule of Criminal Procedure 29 because of the prosecution's failure to prove one conspiracy, he did not renew his motion for severance.

Even if Levine had preserved this claim, it is without merit. The Supreme Court articulated a test for denial of severance motions in *Kotteakos v. United States*, 328 U.S. 750 (1946). Succinctly, the test is whether the error had substantial influence on the judgment. *Id.* at 765. A denial of a severance motion is reversed only if there is abuse of discretion by the trial court. *United States v. Bibby*, 752 F.2d 1116 (6th Cir. 1985), *cert. denied*, 475 U.S. 1010 (1986). No abuse of discretion is apparent in this case. The District Court made repeated instructions to the jury to consider the evidence against each defendant separately. A jury is presumed capable of sorting and considering evidence separately. *Swift*, 809 F.2d at 323. In addition, much of the evidence in the trial would have been admissible if Levine had a separate trial. This Court finds no basis for reversing the District Court's denial of severance.

V. WILLFULNESS ELEMENT OF COUNTS XII-XV

Counts XII-XV charged Reuben Sturman with willfully failing to maintain records and file reports as required by 31 U.S.C. § 5314 (1982). The statute governs records and reports on foreign financial agency transactions. The government based these counts on Reuben Sturman's failure to file Form 90-22.1. This form must be filed by any person who has an interest in or signature over a foreign bank account with a balance in excess of a set dollar amount. Reuben Sturman objects to his conviction on these counts because he believes that the prosecution failed to show that he was aware of the Form 90-22.1 filing requirements.

In *Cheek v. United States*, 111 S. Ct. 604, 610 (1991), the Supreme Court established that the test for statutory willfulness is "voluntary, intentional violation of a known legal duty." Willfulness may be proven through inferences from conduct meant to conceal or mislead sources of income or other financial information. *Spies v. United States*, 317 U.S. 492, 499 (1943).[2] Other circuit courts have concluded that willfulness can be inferred from a conscious effort to avoid learning about reporting requirements. *United States v. Bank of New England, N.A.*, 821 F.2d 844, 855 (1st Cir.), *cert. denied*, 484 U.S. 943 (1987).

The evidence in this case establishes that Reuben Sturman did take actions to conceal his assets from the federal government. He concealed his signature authority,

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[2] The defendant claims that *Spies* is irrelevant since it deals with specific charges of tax evasion rather than conspiracy to defraud the government. I would argue that the case is relevant. *Spies* did involve an indictment which contained a single felony charge of willfully attempting to defeat and evade a tax. However, willful failure to file a return and willful failure to pay taxes were cited as means to the end. 317 U.S. at 494.

his interests in various transactions, and his interest in corporations transferring cash to foreign banks. This conduct could be adequate for the jury to infer willfulness on the part of the defendant. In addition, the defendant did admit knowledge of and failure to answer a question concerning signature authority at foreign banks on Schedule B of his income tax return. This section of the return refers taxpayers to a booklet that further outlines their responsibilities for reporting foreign bank transactions. This booklet discusses the duty to file Form 90-22.1. These resources indicate that the defendant could have learned of the additional requirements quite easily. It is reasonable to assume that a person who has foreign bank accounts would read the information specified by the government in tax forms. Evidence of acts to conceal income and financial information, combined with the defendant's failure to pursue knowledge of further reporting requirements as suggested on Schedule B, provide a sufficient basis to establish willfulness on the part of the defendant.

VI. OBJECTIONS TO PROSECUTORIAL SUMMATION

Defendant Levine contends that statements by the prosecutor in his rebuttal argument deprived him of a fair trial and that the District Court abused its discretion when it denied his motion for mistrial based on the statements. Levine's attorney argued in summation that the prosecution had failed to produce any evidence which linked Levine to the purchase, sale, transfer of funds into or out of Swiss accounts. In response, the prosecution referred to cashiers checks from Nevada banks which had been deposited in Switzerland. The inference was that these checks established that money from sales in Nevada, where Levine managed Sturman's businesses, had been moved into foreign banks. Levine asserts that since no direct or concrete evidence was produced to link him with those foreign bank transactions, the prosecutor's remarks

were prejudicial and improperly suggested an unsupported inference.

Alleged prosecutorial prejudicial or biased remarks will warrant reversal only if the comments have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *United States v. Moreno*, 899 F.2d 465, 468 (6th Cir. 1990) (quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)). In this case, evidence did exist that suggested Levine had participated in the skimming and transfer of money from United States corporations to Swiss accounts. This evidence included Levine's signature on signature cards and the testimony of various witnesses. This evidence is adequate to support an inference by the jury that deposits to the Swiss accounts from Nevada reflects [*sic*] proceeds from the skimming of income in which Levine was involved. In addition, the jury was instructed that the arguments of the attorneys should be dismissed to the extent they were unsupported by the evidence. This Court finds Levine's guilt supported by the evidence and that the prosecution's summary argument did not "infect[] the trial with unfairness."

VII. ALLEGED BIAS OF A JUROR

Levine contends that he has been denied the right to a fair trial because the District Court failed to accord the defendant a hearing based on the defendant's claims of juror bias. This Court has held that,

> [s]ince the trial judge is in the best position to determine the nature and extent of alleged jury misconduct, his decision on the scope of proceedings necessary to discover misconduct is reviewed only for an abuse of discretion.

United States v. Shackleford, 777 F.2d 1141, 1145 (6th Cir. 1985), *cert. denied*, 476 U.S. 1119 (1986). The Supreme Court, in *Remmer v. United States*, 347 U.S.

227, 230 (1954), required a hearing in cases of jury bias to "determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." [3]

During the course of this trial, Juror Olenik approached Judge White with concerns related to Levine's drawing pictures of the jurors during the trial. She advised the judge that some of the other jurors were also uncomfortable. When questioned, several of the jurors admitted being anxious over the drawings and their appropriateness. The judge assured the jurors that drawings by the defendants were permitted. He also told Juror Olenik that the drawings did not resemble any of the jurors. The judge asked each juror whether the incident would have any impact on their ability to remain fair and impartial. All the jurors responded negatively. Although the judge asked the jurors the questions originally requested by defense counsel, he denied defense requests for additional questioning. He did not allow the defense attorneys to ask any questions directly to the jury.

This Court has articulated four points to be considered when determining jury impartiality. *United States v. Zelinka*, 862 F.2d 92 (6th Cir. 1988). First, a hearing must be held. Second, the defendant bears the burden of proving bias. Third, no presumption of prejudice arises from the "contact." And finally, fourth, juror testimony at the hearing to determine juror bias is not inherently suspect. Although no case since *Remmer* has addressed the right of the defense to question jurors,

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[3] *Remmer* involved a case of jury tampering by outside influences. After the completion of the trial, it was revealed that a juror had been approached by someone who suggested it would be profitable to bring in a verdict favorable to the petitioner. The judge had ordered an investigation at the time the juror had reported the incident, decided the offer had been made in jest, and never notified the defense of the incident. The defense learned of the occurrence after the trial in the newspaper. 347 U.S. at 228.

such questioning would normally be important to the defense in its effort to prove bias. However, when the questioning of the jurors occurs during the trial it is preferable it be done by the judge. Jurors may resent being questioned directly by counsel.

Even if direct questioning of the jurors by the defense is required by *Remmer*, the absence of such questioning in this case is harmless error. Each juror was asked separately what had occurred and its impact on them. The juror who approached the court about the issue appeared mainly concerned with whether the defendant's drawings were permissible. The court adequately assured the jurors that Levine had done nothing improper. The judge was justified in taking at face value the jurors' assurances of impartiality. This Court finds that any deficiencies in the juror bias hearing were harmless error and the defendant was not entitled to a mistrial.

VIII. ADEQUACY OF 18 U.S.C. § 1503 ALLEGATION

Count XIV of the indictment charged Reuben Sturman with obstruction of justice in violation of 18 U.S.C. § 1503.[4] The court alleged that Reuben Sturman concealed or suppressed documents of various corporations which had been subpoenaed by the grand jury. Reuben Sturman argues that the charge did not provide sufficient information on the specific documents alleged destroyed or the particular corporations or subpoenas involved.

The Supreme Court has held that the fifth amendment indictment clause and the sixth amendment notice clause, as protected in Federal Rule of Criminal Procedure 7(c), require an inquiry to determine:

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[4] 18 U.S.C. § 1503 (1984) states, in relevant part, that whoever, corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

> first, whether the indictment "contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet,' " and, secondly, " 'in case any other proceedings are taken against him for a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.' "

Russell v. United States, 369 U.S. 749, 763-64 (1962) (citations omitted). Furnishing the defendant with a bill of particulars fails to save deficiencies in the indictment. *Id.* at 769-70. This Court, when reviewing the sufficiency of an indictment, must ask whether the omission complained of deprives the defendant of one of the protections which the guaranty of a grand jury indictment was meant to ensure. *Id.* at 763.

Count XVI of the indictment charges Reuben Sturman with endeavoring to obstruct justice in January 1982 in the United States District Court by destroying, concealing, and suppressing records of various corporations. The indictment clearly establishes the date and manner of the offense as well as the administrative body affected by the actions. This information sets forth all the elements necessary to establish and give a general description of the offense. Any technical deficiencies were harmless error since the indictment sufficiently apprised the defendant of the charges against him to enable him to prepare a response. *See United States v. Weiss*, 491 F.2d 460 (2d Cir.), *cert. denied*, 419 U.S. 833 (1974). The District Court correctly dismissed Reuben Sturman's motion to dismiss the charge.

IX. ADMISSION OF JAMES OLSAFSKY'S TESTIMONY

James Olsafsky was the government's key witness with respect to Count XVI of the indictment charging Reuben Sturman with destroying or concealing subpoenaed docu-

ments. Olsafsky handled the bookkeeping for fifteen to twenty of the stores owned by Reuben Sturman. Olsafsky testified that he was directed by Reuben Sturman to destroy numerous documents subject to a grand jury subpoena. The documents ordered destroyed included all records of corporations then in existence which contained the name of a living person. Records of defunct corporations were not destroyed. During examination of Osalfsky, the government requested that he flip through the file of a defunct corporation and identify what records he would have destroyed seven years previously if he had been asked by Reuben Sturman. The defense asserts that it is prejudicial error to allow a key witness to speculate on what documents he might have destroyed, and to bolster witness testimony with a demonstration of document destruction. They assert they are denied the right to cross-examine since the testimony was not based in fact.

District court decisions relating to the admission of testimony may not be reversed unless the defendant proves abuse of discretion and specific prejudice. Admissibility of evidence is measured by weighing the probative value of the evidence against its prejudicial value. *United States v. Zipkin*, 729 F.2d 384, 389-90 (6th Cir. 1984). The testimony to which Reuben Sturman objects merely serves to identify the types of documents Olsafsky was ordered to destroy. Since Olsafsky did in fact destroy documents, the use of a similar file to identify the type of destroyed documents is based on personal knowledge. The court was within its discretion in permitting the demonstration. Any prejudice would be outweighed by the probative value of Olsafsky's identification of the types of documents Reuben Sturman ordered destroyed.

X. ADMISSION OF EXPERT TESTIMONY

Reuben Sturman objects to the summary testimony of Internal Revenue Agent James Morrow who was involved in the investigation of this case. Reuben Sturman asserts

that Morrow's summary testimony was in fact a final argument to the jury, recounting unproven and contested facts. The defendant argues that permitting Morrow's testimony constitutes prejudicial error and requires a reversal of convictions.

Reuben Sturman relies on a Second Circuit case which held that witness credibility is for determination by the jury and that one witness cannot comment on the credibility of another witness. *United State v. Scop*, 846 F.2d 135, 142, *modified on reh'g*, 856 F.2d 5 (2d Cir. 1988). Agent Morrow, using charts, summarized the evidence and testified that the evidence showed a connection between the defendants, Swiss bank accounts, and a failure to report signature authority and income. Agent Morrow did not comment directly on any specific witness' credibility but rather gave his view of the events. The summary testimony was neither inflammatory nor prejudicial, the District Court properly instructed the jury on the elements of each count charged, and Agent Morrow's testimony and charts aided the jury in organizing the proof presented.

The admission of testimony summarizing evidence has been held to be admissible in income tax prosecutions. *United States v. Lattus*, 512 F.2d 352, 353 (6th Cir. 1975). This Court has allowed such testimony in criminal trials when the judge charges the jury as to all the elements necessary for conviction, where the summary is intended to aid the jury in organizing proof, and where the summary is not inflammatory or prejudicially worded. *United States v. Scales*, 594 F.2d 558, 562 (6th Cir.), *cert. denied*, 441 U.S. 946 (1979). We find that under this standard the District Court properly admitted the testimony.

XI. ADMISSION OF FOREIGN DEPOSITIONS

Reuben and David Sturman both contend that the depositions taken of four Swiss bank officials in Switzerland

did not comply with Federal Rule of Criminal Procedure 15. Rule 15(d) provides:

> Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner provided in civil actions except as otherwise provided in these rules, provided that . . . the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself.

The defendants claim that the admission of the depositions at trial violated their rights to due process, confrontation and effective assistance of counsel.

Depositions of four Swiss bank officials were taken in Switzerland prior to trial. These depositions were presided over by a Swiss magistrate, Benedikt Holdener. Magistrate Holdener had aided the United States in the investigation and prosecution of the defendants. During the depositions, Holdener instructed the defendants to register any objections to the proceeding in writing. He disallowed verbatim transcription. Instead, Holdener dictated a summary of each question and response and noted objections either contemporaneously or required them to be submitted later in writing. Witnesses were given the opportunity to read the summaries and then sign them. During the trial in this case, the English translation of a portion of these depositions was read into the record.

A. Failure to Comply with Fed. R. Crim. P. 15

The District Court overruled the defendants' objections to the foreign depositions finding,

> that the defendants were entitled to be present there, they were entitled to have counsel there, counsel for the government was entitled to have questions read, and it appears to me that counsel for the defendants were entitled to submit questions to the magistrate for answers by the witnesses.

Under a test articulated by the Second Circuit, these procedural safeguards support allowance of the depositions despite variations from Untied States procedures. The Second Circuit held that a foreign deposition would be admissible,

> unless the manner of examination required by the law of the host nation is so incompatible with our fundamental principles of fairness or so prone to inaccuracy or bias as to render the testimony inherently unreliable . . . .

United States v. Salim, 855 F.2d 944, 953 (2d Cir. 1988). Swiss law forbids verbatim transcription so the summary method of establishing the record was the most effective legal method. All defense questions, with just one exception, were submitted to the witnesses so that objections and determinations on admissibility could be litigated later.[5] Although the witnesses were not given an oath, defense conceded that each witness was told the penalties for giving false testimony. The Second Circuit has recognized that an oath may not be given in some foreign countries and that the omission of such an oath does not automatically result in the suppression of the deposition. *See United States v. Casamento*, 887 F.2d 1141, 1172-75 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1138 (1990). Cross-examination, acceptance and consideration of objections, and the review of all written testimony by the witnesses ensured that the testimony complied with Rule 15(d) to the extent possible. Depositions taken in foreign countries cannot at all times completely emulate the United States' method of obtaining testimony. Here, all steps were taken to ensure the defendants' rights while respecting the legal rules established in a different country. The District Court achieved

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[5] It should be noted that only Reuben Sturman exercised his cross-examination rights. The other defendants are presumed to have waived their rights to cross-examination. The one question rejected by Holdener concerned the salary of one of the witnesses.

substantial compliance with Federal Rule of Criminal Procedure 15.

The same factors which demonstrate substantial compliance with Rule 15 rebut any claims based on due process violations or interference with effective assistance of counsel. The ability of the defendants to cross-examine, and the admission of all defense questions protected the defendants against the constitutional violations alleged. Defendants have failed to point to any way in which they were prejudiced by the procedures used.

B. Neutrality or Impartiality of the Magistrate

David and Reuben Sturman also object to Magistrate Holdener presiding over the depositions asserting that he was not neutral because of his role in the prosecutions. Holdener himself overruled the objection. Neither Rule 15 nor Federal Rule of Civil Procedure 28(b) address the issue of neutral or impartial magistrates. Instead, these rules accept the necessity of foreign officials presiding over foreign depositions. If the law of Switzerland permits a person to serve as both magistrate and prosecuting attorney, then that practice must be permissible in obtaining depositions for United States litigation provided that the criteria in *Salim* are met. The defendants have failed to establish evidence that Magistrate Holdener's handling of the deposition unfairly prejudiced the defendants or that the testimony could be considered unreliable. The defendants were provided sufficient opportunity to ask questions designed to refute the credibility of the witnesses. The admission into evidence of the depositions did not violate any constitutional rights of the defendants and did not constitute unfair prejudice.

C. Pierre Perrelet's Identification

The defense also objects to Pierre Perrelet's identification of defendant Reuben Sturman. Perrelet was asked to identify his former customer. He responded by stating, "[p]resumably the second gentlemen at the left side of the table in second place who is leaning on a briefcase

is a customer of SBC whom I looked after in the past." This description identified Reuben Sturman. Defense seeks a reversal of Reuben Sturman's convictions since this identification was based on a presumption. From the context in which the word "presumably" was used, it seems sufficiently clear that the witness was identifying the defendant and the "presumably" was merely a euphemism.

XII. DISQUALIFICATION OF DISTRICT JUDGE

Reuben Sturman argues that the district judge in this case was under a duty to *sua sponte* recuse himself because of his bias against the defendants. After pronouncing the sentence and judgment, the judge requested the defendants and their attorneys to approach the bench. He then stated that he had had to separate his feelings about the defendants' had[*] business from the defendants in imposing sentence. He concluded, however, by noting that he had tried his best to keep his feelings about the type of business in which the defendants were engaged out of the sentencing and believed he had succeeded.[6]

[* The word "had" was deleted from the opinion by order entered October 25, 1991.]

[6] The transcription of the judge's comments reads in part:

> I have gone out of my way, very frankly, as a judge to separate in my mind the business that the defendants are in from what they are charged with.
>
> . . .
>
> However, it is this Court's feeling that even thought [sic] the defendants are suffering and have gone through an ordeal, I can't help but think that having seen many movies that depicted certain scenes, that probably the gentleman involved in selling, first of all, it runs through my mind that somebody has to be paid to appear in those scenes.
>
> Quite frankly, I have to believe that some people who have acted in those scenes have gone through some tremendous pressures of their own.
>
> . . .
>
> I had to say that. I have tried my best to, and I think I have in keeping that from involving the sentence in this case. I have tried to limit it to the tax matters in this case and the

Reuben Sturman argues that the judge's comments indicate a bias which effected [*sic*] the entire four-month trial and previous years of motions and discretionary rulings. The defendant asserts that because the judge failed to recuse himself at the outset of the case, the convictions in the case must be reversed.

A federal judge is required to recuse himself "in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). This Circuit has determined that whenever a judge's impartiality is questioned, it must be determined whether "a reasonable, objective person, knowing all the circumstances, would not have questioned [the judge's] impartiality." *Hughes v. United States*, 899 F.2d 1495, 1501 (6th Cir.), *cert. denied*, 111 S. Ct. 508 (1990); *see also* H.R. Rep. No. 1453, 93d Cong., 2d Sess. 4, *reprinted in* 1974 U.S. Code Cong. & Admin. News 6351, 6354.

Under the test established in *Hughes*, this Court must look at all the circumstances surrounding the case to determine whether a reasonable person would believe the judge was impartial. Several factors support a finding that Judge White acted impartially during the trial. First, the defendants can point to no decision on the part of the judge that clearly demonstrated bias. The contentions in the appeal that raise abuse of discretion issues have been found to be without merit. Second, the sentences given the defendants, rather than exhibiting bias against the defendants, are substantially below the level requested by the government and appear fair under the circumstances. Third, this Court may take at face value Judge White's assertion that he set his feelings about the defendants' business aside. Judges, whether they are hearing tax evasion cases or vicious murder

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conspiracy that was alleged and the other charges in this case which have nothing to do with—indirectly it may with the businesses—but should not involve my thinking in the sentences.

prosecutions, may have views about the nature and heinousness of the underlying crime. All judges, as part of their decisionmaking process, seek to set these feelings aside. Judge White merely articulated a tension all judges share. This Court holds that the defendants have failed to prove that Judge White's personal beliefs concerning pornography tainted the proceedings.[7]

XIII. VIOLATIONS OF THE MUTUAL ASSISTANCE TREATY

Reuben and David Sturman both raise objections to the use of records obtained from Switzerland under the Treaty Between the United States of America and the Swiss Confederation on Mutual Assistance in Criminal Matters, May 25, 1973, United States-Switzerland, 27 U.S.T. 209, T.I.A.S. 8302. The Treaty ("Treaty") states that Switzerland agrees to provide information and access to bank records in Switzerland only for a specifically defined list of criminal offenses. Reuben Sturman asserts that the United States government submitted false information concerning the defendant's connection with organized crime in order to obtain his records under the Treaty. He claims that these submissions and the resultant release of records violated his fourth amendment privacy and fifth amendment due process rights. David Sturman objects to the use of the records obtained under the Treaty provisions in the case against him since the government did not provide evidence to Switzerland concerning David Sturman when they sought the records.

The United States requested assistance from the government in Switzerland in obtaining the bank records of Reuben Sturman. In acquiring these records, the United States government must submit evidence to Switzerland that shows the requested records relate to one of a select list of criminal offenses. The United States government

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[7] No motion for recusal was filed with the District Court. Indeed, defense counsel complimented the district judge at this same sentencing hearing on his fairness in presiding over the case.

submitted evidence to Switzerland which indicated that Reuben Sturman had some relationship to organized crime. The evidence submitted to Switzerland was never disclosed to Reuben Sturman despite his discovery request. The District Court, after a [*sic*] *in camera* review of the evidence, ruled that the defendant had failed to show the government misrepresented the facts. Both David and Reuben Sturman assert that the records obtained as a result of the United States' action under the Treaty should not be admissible. They further argue that should this evidence be found inadmissible, the convictions based on the evidence should be reversed.

Article 37 of the Treaty provides that,

> [t]he existence of restrictions in this Treaty shall not give rise to a right on the part of any person to take any action in the United States to suppress or exclude any evidence or to obtain other judicial relief in connection with the requests under this Treaty . . . .

Treaty Between the United States of America and the Swiss Confederation on Mutual Assistance in Criminal Matters, May 25, 1973, United States-Switzerland, 27 U.S.T. 209, T.I.A.S. 8302.[8] This language indicates that neither David nor Reuben Sturman have standing to raise a claim under the Treaty. Relying on the decision of the D.C. Circuit Court in *Cardenas v. Smith*, 733 F.2d 909, 917-19 (D.C. Cir. 1984), defendants claim that the Treaty cannot deprive them of constitutional rights. *Id.*

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[8] The Technical Analysis of Article 37 goes further adding,

> [e]nforcement of the provisions of the Treaty is a matter for the Contracting parties, and does not give rise to any right on the part of defendants . . . to obtain judicial relief . . . .

Technical Analysis of the Treaty Between the United States and Switzerland on Mutual Assistance in Criminal Matters, *reprinted in* Message from the President transmitting the Treaty with the Swiss Confederation on Mutual Assistance in Criminal Matters, 94th Cong., 2d Sess. 34 (1976).

at 919.[9] Because we find the defendants have not been deprived of their constitutional rights, we do not consider whether they have standing to raise such claims.

A. Fourth Amendment

Reuben Sturman maintains that, because of Switzerland's strict banking secrecy laws, he has a reasonable expectation of privacy protected by the fourth amendment. In support of his assertion of an expectation of privacy, he relies on the Swiss imprisonment or fine for revealing information and on the Treaty's goal of preserving the integrity of Swiss banking law. In essence, the defendant argues a constitutional right created by the statutory rights granted him by a foreign country to records in that country. No such right of privacy in banking records is recognized in the United States. *United States v. Miller*, 425 U.S. 435 (1976).

Any privacy right conferred on Reuben Sturman by Switzerland and any remedy given for a violation of that right is limited by the terms of the Treaty. The Treaty clearly indicates that the Swiss government has agreed that an American citizen's right to privacy can be curtailed under certain circumstances. The Treaty also evidences a decision by the Swiss government to limit the remedy available once bank records are released. The

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[9] The *Cardenas* case involved an appeal by a nonresident alien seeking redress in United Sttaes Courts for the seizure of Swiss accounts in which plaintiff had an interest. The United States government had encouraged the Swiss government to seize the accounts. The plaintiff claimed that the seizure violated her rights under the fourth and fifth amendments as well as various statutory and Treaty related obligations. The D.C. Circuit recognized that Article 37 precluded any claims arising under the Treaty. The court found, however, that there was no evidence that the Treaty intended to preclude judicial review of the statutory and constitutional claims. The court reversed the lower court's decision to dismiss the complaint so that the statutory and constitutional claims could be heard. 733 F.2d at 911-19.

Swiss government has limited the right to privacy given by its laws and denied to depositors any expectancy that, if records were disclosed in the United States, they could be suppressed or excluded from evidence. This intent is plainly stated in the language of Article 37 which is part of the law of Switzerland as well as the United States.

Even if Article 37 does not foreclose a fourth amendment claim for suppression of evidence, Reuben Sturman had no reasonable expectation of privacy in the documents for fourth amendment purposes. The Treaty makes any expectation of privacy limited through its terms. If no such expectation exists, then his ability to raise a fourth amendment claim is limited by the holdings of the United States Supreme Court. The Supreme Court has held that there is no privacy interest in the records and documents of third parties. *Rakas v. Illinois*, 439 U.S. 128 (1978); *Miller*, 425 U.S. at 435. Further, the fourth amendment does not justify exclusion of evidence when the defendant is not the victim of the challenged practices. The supervisory power of the federal courts does not allow it to suppress evidence that has been seized unlawfully from a person not before the court. *United States v. Payner*, 447 U.S. 727 (1980). Thus, since an individual has no privacy interest in his bank records, he cannot make a motion for exclusion once they are obtained. Only the holder of the records, for example the bank, can raise an objection.

B. Due Process Claims

Reuben Sturman asserts that the submission of false statements linking him to organized crime in order to obtain information from a foreign country is the type of governmental misconduct which violates substantive due process. He also claims that he was denied any reasonable opportunity to respond to the charges in the documents submitted to the Swiss government and has thus been denied his procedural due process rights. These claims are without merit.

A review of the submissions to the Swiss government reveals that the documents contain no serious misrepresentations concerning the defendant. The District Court's review of the documents generated the same opinion. Even if misrepresentations were found, a reversal of conviction is not automatic. A federal court's supervisory power allows the court to remedy cases of serious governmental misconduct. *Payner*, 447 U.S. at 727; *United States v. Gjieli*, 717 F.2d 968 (6th Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984). Reversals of convictions using this power should not be granted readily. *Id.* at 978. This Court has held that the reversal of a conviction should be granted only when the following prerequisites are met:

> (1) there must be a constitutional injury which is personal to the complaining defendant, (2) the injury must "harm" the defendant in a legally significant way, (3) there must be an injury to the judicial system, (4) the "remedy" selected by the Court to preserve judicial integrity and deter future misconduct may not exceed established limitations on the court's power, and (5) the remedy selected must be narrowly tailored.

Id. at 978-79.

In *Gjieli*, the government improperly released defendant, Zeff Lulgjuraj, from prison. His release signalled his codefendants that a Bureau of Alcohol, Tobacco and Firearms agent was ready to deliver Lulgjuraj to them. The government officials submitted a false writ to a district judge in order to obtain the prisoner's release. One agent posed as a United States Marshal in order to secure custody of the prisoner. Applying the test above, this Court held that the government's misconduct did not entitle the defendants to reversal of their convictions. *Id.* at 979.

In this case, Reuben Sturman has suffered no identifiable constitutional injury. The defendant has no consti-

tutional right to review submissions to the Swiss government made in the course of an investigation. Even if such right existed, the defendant received adequate protection through the *in camera* review of the documents by the District Court and this Court. As discussed above, no right arises from any expectation of privacy asserted by the defendant. Reuben Sturman also urges that this Court find a deprivation of a liberty interest due to the stigmatization of his name. The documents submitted to the Swiss government have never been released or made public. This Court has held that "in order to establish a protectable liberty interest, the plaintiff must demonstrate . . . that the defendants publicly and voluntarily disclosed stigmatizing charges or information . . . ." *Yashon v. Gregory*, 737 F.2d 547, 556 (6th Cir. 1984).

Misconduct, if any, committed by the government in this case is not as serious as that committed in *Gjieli* where a reversal of conviction was denied. We find that the defendant has failed to satisfy the test articulated in *Gjieli*.

C. David Sturman

David Sturman obtained a decision from the Swiss Federal Supreme Court which held that no Swiss evidence could be used against him in a case for tax evasion. Notice of Ruling by the Swiss Supreme Court That No Evidence Obtained from Switzerland May be Used Against David Sturman, October 13, 1989. Using this decision, David Sturman objected to the use of the evidence in the District Court. The District Court overruled his objection. We agree. The Swiss Central Authority advised the United States government that the Swiss documents could only be used against the codefendants if they were participants in Reuben Sturman's criminal activities. Article 5 para. 2(b) of the Treaty provides that evidence obtained under the Treaty can be used against persons accused of participating in the criminal

activity and accessories. Evidence produced during this trial shows David Sturman's participation in Reuben Sturman's criminal activity. The admission of the Swiss evidence was thus permissible under the Treaty.

XIV. DENIAL OF REUBEN STURMAN'S DISCOVERY REQUEST

A Special Agent of the IRS, Richard N. Rosfelder, who was in charge of the investigation against the defendants, testified at trial about the investigation. Following his testimony, Reuben Sturman requested that the government produce several documents related to the testimony. Specifically, the defendant requested Rosfelder's Special Agent's Report outlining the investigation and suggesting indictment, the submission to the Swiss government sent with the request for information under the Mutual Assistance Treaty, and the agent's grand jury testimony. The defendant claims that the government failed to produce 99% of the Special Agent's Report, the Swiss submissions, and 100 pages of grand jury testimony. The District Court held that the missing documents did not need to be produced and refused a request to conduct further voir dire of Special Agent Rosfelder to determine the contents of the documents.

A trial court's rulings on matters relating to the production of documents is reviewed under a clearly erroneous standard. *United States v. Nathan*, 816 F.2d 230 (6th Cir. 1987). The defendant raises two arguments in support of his contention that the denial of his discovery motion was reversible error.

First, the defendant claims that the denial of the discovery motion violates the provisions of the Jencks Act. 18 U.S.C. § 3500 (1985). The Jencks Act addresses demands for the production of statements and reports of witnesses. Particularly, the statute provides:

> After a witness called by the United States has testified on direct examination, the court shall, on

> motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness testified.[10]

It is clear that the submissions to the Swiss government do not fall under the protections of the Act since they were prepared and signed by government attorneys, were not a verbatim transcript of any statements made by the agent, and were not reviewed for accuracy by the agent. The Special Agent's Report was reviewed by the District Court and certain sections which appeared to be statements of the witness were ordered released to the defendant. The remainder of the document is an internal prosecution report, prepared prior to the events discussed under direct examination, and thus exempt from discovery under the Jencks Act. *United States v. O'Keefe*, 825 F.2d 314, 319 (11th Cir. 1987). The defendant also protests the denial of discovery with respect to the redacted portions of the grand jury testimony. The government claims that these portions did not need to be given to the defendant since they did not relate to the direct testimony of the witness and merely summarized documentary evidence and discussed subjects of investigation other than Reuben Sturman. A review of the redacted portions of the testimony reveals that this assessment is accurate.

Second, the defendant raises a protest to the nondisclosure of these documents based on *Brady v. Maryland*,

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[10] The statute defines the term statement as

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or
>
> (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

18 U.S.C. § 3500(e).

373 U.S. 83 (1963). The Supreme Court held in *Brady* that the suppression by the prosecution of evidence which is material to either guilt or punishment violates due process. This Court has held that,

> if the government does fail to disclose *Brady* material, the defendant has a constitutional remedy for the nondisclosure *only* if the defendant can show that there is a reasonable probability that "the omission deprived the defendant of a fair trial."

United States v. Presser, 844 F.2d 1275, 1282 (6th Cir. 1988) (citation omitted) (emphasis in original). The defendant has failed to show a reasonable probability that he was denied a fair trial. The evidence supporting the defendant's conviction was substantial. No arguments were made which suggest the information withheld contains facts which go directly to the guilt or innocence of the defendants. Both this Court and the District Court, in their *in camera* review, found that they do not. The District Court did not err in denying Reuben Sturman's discovery motion.

XV. THE BANK SECRECY ACT AND SELF-INCRIMINATION

Reuben Sturman was under investigation for tax-related violations from 1976 and was under grand jury investigation from 1978. These investigations included the examination of the defendant's foreign bank accounts. Reuben Sturman's indictment listed several counts, associated with The Bank Secrecy Act, which alleged that the defendant had failed to file information related to the foreign accounts during the years he was being investigated. The defendant claims that the Bank Secrecy Act, which requires a person to file certain information if they have over a minimum amount of money in foreign accounts, is directed at persons suspect of criminal activities and promotes self-incrimination. The defendant asserts that the Act is therefore unconstitutional and that

the trial court erred in denying his motion to dismiss and motion for judgment of acquittal on the counts related to the Act.

The Supreme Court has held that taxpayers cannot assert a violation of their rights against compulsory self-incrimination when they refuse to answer questions on a tax return for fear authorities will discover illegal activity. *United States v. Sullivan*, 274 U.S. 259, 260 (1927). *Sullivan* implies that any objections to specific questions will be considered only if the individual files a completed return and raises the objections in the return. A defendant's fear of self-incrimination cannot serve as a defense to a failure to complete the information called for on his tax return unless he raised an objection when he filed.

Even if *Sullivan* were not applicable to this situation, the defendant's claim is still without merit. The defendant bases his claim on a line of cases which have found various reporting requirements in violation of the privilege against compulsory self-incrimination when specific conditions are met. *Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968); *Haynes v. United States*, 390 U.S. 85 (1968).[11] The Supreme Court held in these cases that statutes violate the right against compulsory self-incrimination when (1) they are directed against a "selective group inherently suspect of criminal activity"; (2) requirements are imposed in an "area permeated with criminal statutes"; and (3) reporting requirements would have placed the subject in real danger of self-incrimination. *See Mar-*

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[11] These cases dealt with an occupational tax related to wagers. Under the statute, persons registering as wagers [*sic*] had to keep on their persons stamps showing the payment of tax, maintain daily wagering records, and keep their books open for inspection. These persons were also liable for an occupational tax. The petitioners in these cases argued that the registration and tax requirements violated their rights against self-incrimination. Based on the criteria discussed above, the court found for the petitioners.

chetti, 390 U.S. at 47; *Grosso*, 390 U.S. at 64. The Bank Secrecy Act applies to all persons making foreign deposits, most of whom do so with legally obtained funds. The requirement is imposed in the banking regulatory field which is not infused with criminal statutes. In addition, the disclosures do not subject the defendant to a real danger of self-incrimination since the source of the funds is not disclosed. It is not evident from the information provided whether the money in the account came from a legitimate adult entertainment business or from a scheme to skim money from a business. Thus, the defendant has failed to show that the Bank Secrecy Act violated any individual right *Marchetti* and *Grosso* seek to protect.

XVI. DOUBLE JEOPARDY

Reuben Sturman received consecutive fines for Counts VII-XI, charging him with making and subscribing a false tax return in violation of 26 U.S.C. § 7206(1), and Counts II-VI, charging him with attempting to evade income taxes in violation of 26 U.S.C. § 7201. Relying on several cases from other circuit courts,[12] the defendant argues that filing a false tax return under section 7206(1) is a lesser included offense under attempted income tax evasion in violation of section 7201. In cases of lesser included offenses, consecutive sentences are double jeopardy since the offender cannot be tried and convicted under both statutes. At least one court, however, has recognized that the cases cited by the defendant address only cases where the proof of tax evasion necessarily proves the preparation and filing of a fraudulent return. *United States v. Franks*, 723 F.2d 1482, 1487 (10th Cir. 1983), *cert. denied*, 469 U.S. 817 (1984). The Tenth

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[12] *United States v. Citron*, 783 F.2d 307, 312 (2d Cir. 1986), *following remand*, 853 F.2d 1055 (2d Cir. 1988); *United States v. Pulawa*, 532 F.2d 1301, 1302 (9th Cir. 1976); *United States v. Slutsky*, 487 F.2d 832, 845 (2d Cir.), *cert. denied*, 416 U.S. 937 (1974).

Circuit found that a misrepresentation of foreign bank account information is distinct from understating income on a tax return. Proving that a taxpayer violated section 7602(1) by misrepresenting her interest in or signature authority on a foreign account does not necessarily prove tax evasion. When the proofs on the charges are separate, the sentencing may be consecutive. *Id.* at 1487. We adopt the reasoning of the Tenth Circuit and allow the sentence to stand.

XVII. REFUSAL TO GIVE JURY INSTRUCTIONS

Reuben Sturman objects to the trial court's rejection of nine jury instructions requested by the defendant. Defendant seeks a reversal of his convictions due to the jury instruction errors. The defendant's objections are without merit.

The first requested jury instruction whose denial the defendant protests would have informed the jury that the activities of the defendants were not illegal unless the activities furthered a conspiracy to impede the IRS. A jury instruction read by the court instructed the jury that a conviction of the defendants on Count I was only possible if the government showed that the "means or methods described in the indictment were agreed upon to be used in an effort to . . . accomplish . . . the conspiracy." This instruction adequately covers the same ground as the requested instruction.

Defendant's requested jury instructions numbered 9, 10, 13, 14, and 15 set forth the defendant's argument that if the government had proved evasion of corporate, as opposed to individual income, then he was entitled to acquittal. The defendant asserts that the failure to present the requested instructions resulted in the jury only being presented with the prosecution's theory of the case. These instructions were addressed at Counts II-VI and and Counts VII-XI. The defendant has waived his right

to object to the court's refusal to give instructions 14 and 15 by failing to present distinct and clear objections with regard to those instructions.

The defendant's theory of the case as presented in requested instructions 9, 10, and 13 makes an incorrect statement of law. The requested instructions call on the jury to distinguish between income of the defendant and income accruing to the corporations. In this case, all the Swiss accounts were set up in the name of individuals. This Court, in *Davis v. United States*, 226 F.2d 331 (6th Cir. 1955), *cert. denied*, 350 U.S. 965 (1956), held that the unexplained transfer of funds to an individual's account constituted income to the individual. The government was not required to prove what use was made of the funds. The defense failed to prove that any of the funds were used to the benefit of any corporation.

The defendant next objects to the District Court's rejection of his suggested instructions 7 and 8 which addressed his reading of *Minarik*, 875 F.2d at 1186. This Court has found that the District Court properly allowed Count I and that *Minarik* did not apply in this case. Thus, no error resulted from the District Court's failure to give instructions 7 and 8.

The final objection raised in connection with jury instructions concerns defendant's requested instruction 17. This instruction, which sought to define when a false statement is knowingly made, was requested in relation to Counts VII-XI which charged the defendant with willfully filing fraudulent tax returns. The instruction stated that in order to establish a knowingly made false statement the defendant must knowingly make a statement and know that the statement is false. The instruction was designed to present defense's assertion that failure to answer a question did not constitute a knowingly made false statement. It is a crime for any person to willfully make "any return, statement . . . which he does not believe to be true and correct as to every mate-

rial matter." 26 U.S.C. § 7206(1). The District Court properly instructed the jury that the government had to prove that the defendant willfully made a false statement "as to a material matter alleged in the indictment." This instruction covered the issue presented by requested instruction 17. This Court finds no error on the part of the District Court with regard to jury instructions.

XVIII. ADMISSION INTO EVIDENCE OF FOREIGN BANK RECORDS

Volumes of business records from seven foreign banks were presented at trial. These records were "certified" by twelve affidavits or certificates of authenticity. This practice, adopted by Congress in 18 U.S.C. § 3505, dispenses with the necessity of calling a live witness to establish authenticity.

Section 3505 allows the admission of foreign records, and prevents their exclusion as hearsay, provided that a foreign certification attests to certain facts.[13] A foreign certification serves to authenticate the records. Reuben

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[13] 18 U.S.C. § 3505 reads in relevant part:

(a)(1) In a criminal proceeding in a court of the United States, a foreign record of regularly conducted activity, or a copy of such record, shall not be excluded as evidence by the hearsay rule if a foreign certification attests that—

(A) such record was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters;

(B) such record was kept in the course of regularly conducted business activity;

(C) the business activity made such a record as a regular practice; and

(D) if such record is not the original, such record is a duplicate of the original;

unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

. . . .

Sturman asserts that there was error in the admission and maintenance of records the prosecution received from Switzerland. He also objects to the admission of the foreign bank records urging that section 3505 is unconstitutional because it deprives him of his right to confrontation.

The certificates at issue indicated that the person signing the certificates was acting in the capacity of custodian of the records, that the records were made or received in the regular course of business, and that the records were part of a regular business practice that made or received the documents at the time, or within a reasonable time thereafter, of the recorded event. These attestations satisfy most of the provisions of section 3505. The certificate fails to state that the "record was made . . . by (or from information transmitted by) a person with knowledge of those matters." 18 U.S.C. § 3505(a)(1)(A). Reuben Sturman contends that this foundational element must be established. This Court, when interpreting similar language in Federal Rules of Evidence 803(6),[14] has held that a witness need only have knowledge of the recordkeeping procedures. *United States v. Hathaway*, 798 F.2d 902 (6th Cir. 1986). In this case, a bank official, who would necessarily have some knowledge of the bank's recordkeeping procedures, provided the certification.

The defendant also protests that the certificates were not physically attached to the records being authenticated and that the certifications did not identify the specific records they authenticate. Neither of these assertions is valid. Section 3505 contains no requirement that the certificate be attached to the authenticated record. Each

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[14] Fed. R. Evid. 803(6) list [*sic*] evidence which may not be excluded by the hearsay rule. Section 6 addresses records of regularly conducted activity. Such records must be "made at or near the time by, or from information transmitted by, a person with knowledge . . . ."

certificate was associated with a transmittal record that listed the account and record of accounts being produced. The certifications incorporated these transmittal letters.

The defendant also raises the following arguments: (1) that the "legal advisor" who signed the certification was not a "custodian" under the requirement of section 3505; (2) that section 3505 does not refer to records "received" which the certification includes in its description of the records; and (3) that the certification states that it was the regular course of business to make "documents of this kind" rather than the specific record being authenticated. After a careful consideration of these issues, this Court find the claims to be without merit.

Reuben Sturman also alleges that section 3505 deprives him of his sixth amendment right of confrontation. We disagree. The confrontation clause does not establish an absolute exclusion of all hearsay. Testimony of an unavailable witness is permissible provided it contains an "indicia of reliability." *United States v. Miller*, 830 F.2d 1073 (9th Cir. 1987), *cert. denied*, 485 U.S. 1033 (1988) (quoting *Ohio v. Roberts*, 448 U.S. 56, 63 (1980)). The Supreme Court in *Bourjaily v. United States*, 483 U.S. 171, 182-83 (1987), has held that "[b]ecause 'hearsay rules and the Confrontation Clause are generally designed to protect similar values,' . . . no independent inquiry into reliability is required when the evidence 'falls within a firmly rooted hearsay exception.'" (quoting *Roberts*, 448 U.S. at 66) (citations omitted). Section 3505 establishes an exception to the hearsay rule for foreign business documents. This exception ensures that the requirements of the Confrontation Clause are automatically satisfied.

Finally, the defendant claims that the prosecution failed to satisfy the foundational requirements of Federal Rules of Evidence 602 and 901. Rule 602 requires the introduction of evidence which supports a finding that a witness has personal knowledge of the matter on which

they are to testify. Rule 901 requires authentication and identification prior to the admissibility of any evidence. The admissibility of foreign records is a question that may be determined by the court before trial. Fed. R. Evid. 104(a); Fed. R. Evid. [*sic*] 3505(b); *United States v. Tedder*, 801 F.2d 1437, 1448 (4th Cir. 1986), *cert. denied*, 480 U.S. 938 (1987). The District Court held a pretrial hearing on November 6 and 16, 1987 to determine the admissibility of the challenged records. There was no necessity of repeating this hearing before the jury. In addition, the prosecution did have Special Agent Rosfelder testify regarding the receipt, custody, and certification of the records. The defense was given an opportunity at that time to cross-examine the witness.

Special Agent Rosfelder admitted during his testimony that he did not have custody of the records at all times and therefore lacked personal knowledge regarding some of the details of the receipt and maintenance of the records. Even if the court did commit error by allowing Rosfelder to testify on an issue of which he did not have personal knowledge, the error is harmless. Special Agent Rosfelder's testimony was sought as the result of challenges to the certification of the records. Since we find the certificates to be adequate, the testimony was unnecessary.

CONCLUSION

Accordingly, the decision of the District Court is AFFIRMED as to all defendants.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 90-3147/48/51/3750

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID A. STURMAN, *et al.*,
Defendants-Appellants.

[Filed Jan. 8, 1992]

ORDER

BEFORE: KENNEDY and MILBURN, Circuit Judges; and WILHOIT,* United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

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* Hon. Henry R. Wilhoit, Jr. sitting by designation from the Eastern District of Kentucky.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA Plaintiff vs. REUBEN STURMAN, et al. Defendants	CR85-133 MEMORANDUM AND ORDER (Filed Nov. 26, 1986)

On December 4, 1985 the Court ordered certain pre-trial motions in this criminal case to be referred to the United States Magistrate for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 19.08. The Court has now received the Magistrate's report and recommendation concerning defendant Reuben Sturman's motion for discovery of all documents and information submitted by the United States to the government of Switzerland in connection with the United States' efforts to gather evidence in this case and for discovery of all related documents. Defendants David Sturman and and [sic] Mel Kamins have filed similar motions. This matter is before the Court upon the government's objections to the Magistrate's report and recommendation.

The government acquired information and documents from the government of Switzerland under the Treaty Between the United States and Switzerland on Mutual Assistance in Criminal Matters. This Treaty expressly provides that its terms do not apply to violations concerning taxes, the type of crime for which the defendants are charged. Chapter I Article 2, paragraph 1 (c)(5). An exception to this exclusion, Chapter II, Article 6 provides:

> 1. The Contracting Parties agree to assist each other in the fight against organized crime as

provided in this Chapter and with all means otherwise available under this Treaty and other provisions of law.

2. This Chapter shall apply only to investigations and proceedings involving a person who, according to the request, is or is reasonably suspected to be:

   a. knowingly involved in the legal activities of an organized criminal group, described in paragraph 3, and who is:

      1. a member of such a group; or

      2. an affiliate of such a group performing supervisory or managerial functions or regularly supporting it or its members by performing other important services; or

      3. a participant in any important activity of such a group; or

   b. a public official who has violated his official responsibilities in order to knowingly accommodate the desires of such a group or its members.

3. For the purpose of this Chapter the term "organized criminal group" refers to an association or group of persons combined together for a substantial or indefinite period for the purposes of obtaining monetary or commercial gains or profits for itself or for others, wholly or in part by illegal means, and of protecting its illegal activities against criminal prosecution and which, in carrying out is [sic] purposes, in a methodical and systematic manner:

   a. at least in part of its activities, commits or threatens to commit acts of violence or other acts which are likely to intimidate and are punishable in both States; and

   b. either:

1. strives to obtain influence in politics or commerce, especially in political bodies or organizations, public administrations, the judiciary, in commercial enterprises, employers' associations or trade unions or other employees' associations; or
2. associates itself formally or informally with one or more similar associations or groups, at least one of which engages in the activities described under subparagraph b(1).

Article 7 provides in part:

2. Assistance under this Chapter shall be rendered in investigations or proceedings involving violations of provisions on taxes on income . . . only if, according to the information furnished by the requesting State:
   a. the person involved in the investigation or proceeding is reasonably suspected by it of belonging to an upper echelon of an organized criminal group or of participating significantly, as a member, affiliate or otherwise, in any important activity of such a group;
   b. the available evidence is in its opinion insufficient, for the purpose of a prosecution which has a reasonable prospect of success, to link such person with the crimes committed by the organized criminal group with which he is connected in the sense of paragraph 2 of Article 6; and
   c. it has been reasonably concluded by it that the requested assistance will substantially facilitate the successful prosecution of such person and should result in his imprisonment for a sufficient period of time so as to have a significant adverse effect on the organized criminal group.

In order to receive information under the Treaty, the government must comply with the above provisions. The government must represent to the Swiss officials that Reuben Sturman was either a member of the upper echelons of an organized criminal group or participated significantly in an important activity of an organized criminal group. Defendant contends that allegations of this type made to Swiss officials to obtain information were false and in violation of his Fourth, Fifth and Sixth Amendment rights under the Constitution of the United States. Therefore these documents are material to his defense and he is entitled to discovery of these documents.

Defendant's first contention is that misconduct in procuring foreign assistance in criminal investigations may serve as a basis for claims based on the Fourth, Fifth and Sixth Amendments. The defendant relies on *Cardenas v. Smith*, 733 F.2d 909 (D.C. Cir. 1984). In the *Cardenas* case the Swiss government seized the plaintiff's assets by freezing her bank account. Thus Fourth and Fifth Amendment claims were raised concerning the propriety of the seizure. The case at bar is distinguishable from *Cardenas* in that no property of Reuben Sturman was seized. In addition *Cardenas* was a civil action wherein damages were sought and the more liberal discovery procedures under the Federal Rules of Civil Procedure applied.

Article 37 of the Treaty provides:

1. The existence of restrictions in this Treaty shall not give rise to a right on the part of any person to take any action in the United States to suppress or exclude any evidence or to obtain other judicial relief in connection with requests under this treaty . . . The Technical Analysis of the Treaty explaining Article 37 states in Part at page 63 and 64:

> This Article governs the rights of persons to appeal determinations with respect to requests for assistance pursuant to the Treaty. Separate provisions were necessary for each country because of differences in legal requirements. Enforcement of the provisions of the Treaty is a matter of the Contracting Parties and does not give rise to any right on the

> part of defendants, subjects, witnesses or other persons to obtain judicial relief except as specially provided therein.
>
> With regard to actions in the United States, Paragraph 1 provides that except for rights with respect to:
>
> (a) searches and seizures (Article 9 para. 2:) the restrictions in the Treaty shall not give rise to a right on the part of any person to take action to suppress or exclude evidence or to obtain other judicial relief.

Review of claims arising under the Treaty is prohibited but claims stemming from the Constitution are not precluded. *Cardenas v. Smith* at 918. Thus defendant may have a meritorious argument if the government's conduct amounts to an illegal search and seizure.

A search and seizure occurs when an individual has a legitimate expectation of privacy and this expectation is one that society recognizes as reasonable. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), *United States v. Bailey*, 628 F.2d 938 (6th Cir. 1980).

Defendant has not satisfied the first part of the test requiring a legitimate expectation of privacy. The Supreme Court has held that there is no legitimate expectation of privacy in bank records. Bank documents contain information voluntarily conveyed to the banks and distributed to bank employees in the ordinary course of business. Bank records are used in criminal tax and regulatory investigations and proceedings. The depositor takes the risk that information given to the bank will be conveyed to the government. There are [sic] no Fourth Amendment interest in records kept by banks. *United States v. Miller*, 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976). Furthermore, bank secrecy laws do not create a legitimate expectation of privacy not available in the United States. *United States v. Payner*, 447 U.S. 727, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980), *United States v. Ghidoni*, 732 F.2d 814 (11th Cir. 1984). Bank records are not protected from disclosure by the constitution. *United States v. Ghidoni* at 817.

The second prong of the test as to whether a search and seizure violates constitutional rights requires a showing that if there was an expectation of privacy, it must be one that society recognizes as reasonable. This part of the test has also not been satisfied. The United States has a treaty with Switzerland which provides for production of secret bank records. The existence of the treaty negates the reasonableness of the expectation of privacy. The conclusion must be that no search and seizure was conducted.

Additionally, the government points out that it has received numerous records from several Swiss banks which includes [sic] signature cards from thirty one separate accounts in the names of individuals and corporations. Reuben Sturman's name does not appear on any of these accounts. The government contends that Mr. Sturman has signed these accounts in several difference [sic] fictitious names. If Mr. Sturman truly had an expectation of privacy he would have used his true name on the accounts.

The accounts in question were located at three different Swiss banks. Each of these banks has a branch in New York City. The government could have obtained these records through the U.S. branches of the Swiss banks. *United States v. Ghidoni* at 732 F.2d 817 n 5.

The government argues that the defendant does not have standing to succeed in his Fourth Amendment violation claim. A defendant has standing if the alleged constitutional violation infringes upon a right which the Fourth Amendment was designed to protect. Fourth Amendment rights are personal rights. A person who claims damage by an illegal search and seizure through introduction of evidence obtained by a search of a third person's premises or property has no standing to assert a Fourth Amendment claim. *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). Since bank records are the property of the bank, not the individual depositor, Reuben Sturman has no standing to maintain a Fourth Amendment challenge. *United Sates* [sic] *v. Payner, supra*. Also, as previously stated, Reuben Sturman's name does not appear on these accounts. According to case law he personally has not suffered a deprivation of constitutional rights. Therefore

Reuben Sturman does not have standing to challenge a search and seizure.

Defendant has enumerated several other reasons why the government's conduct amounts to a search and seizure. These contentions will be discussed briefly. A seizure of property occurs when there is some meaningful interference with an individual's possesory interests in that property. *United States v. Jacabsen*, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984). But the government in the case at bar obtained copies of documents belonging to Swiss banks, not to Sturman.

The treaty provides a procedure for obtaining documents. Those provisions do not refer to search and seizure. The government submitted documentation to the Swiss government to begin the necessary procedures to enable the Swiss to perform their obligations under the Treaty. This conduct was not a search and seizure.

The usual method for obtaining bank records is by subpoena *duces tecum*. The government could have obtained the documents in this manner from the New York branches of the Swiss banks. *United States v. Ghidoni, supra*. Because the government used the methods provided by the treaty does not transfer its conduct into a search and seizure.

Defendant's argument based on *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), that a search warrant may be invalidated because of inaccuracies in a supporting affidavit is without merit because the Fourth Amendment is not applicable. Also, *Franks v. Delaware* requires the defendant to make a substantial showing that the affiant's statements were false or with reckless disregard for the truth. Conclusory statements are insufficient. *United States v. Phillips*, 727 F.2d 392 (5th Cir. 1984). Defendant has not shown that representations to the Swiss government, if any, were false.

The defendant indicated that he intends to move for dismissal of the indictment or suppession [sic] of evidence obtained from Swiss authorities on the grounds that the government engaged in blatantly illegal investigatory tactics which violated his due process rights under the Fifth Amendment.

Article 37 of the Treaty states:

> "The existence of restrictions in this Treaty shall not give rise to a right on the part of any person to take any action in the United States to suppress or exclude any evidence or to obtain other judicial relief in connection with requests under this Treaty."

This provision seems to preclude defendant's Fifth Amendment argument. *United States v. Johnpoll*, 739 F.2d 702 (2nd Cir. 1984).

Defendant's next contention is that the requested documents are material to the question of whether the government introduced false testimony to the grand jury, introduced the spector of organized crime into a prosecution where such suggestion was unwarranted and instituted the instant prosecution knowing that much of the evidence was acquired on the basis of knowing falsehoods in violation of defendant's Fifth and Sixth Amendment rights.

There exists a presumption of regularity concerning grand jury proceedings. *United States v. Battista*, 646 F.2d 237 (6th Cir. 1981), cert. denied 454 U.S. 1046, 102 S.Ct. 586, 70 L.Ed.2d 488 (1981). In order to obtain grand jury materials under Rule 6(e)(3)(C)(ii) of the Federal Rules of Criminal Procedure, a defendant must show that grounds may exist to support a motion to dismiss because of matters occurring before the grand jury. Defendant must show prejudice and the existence of a long standing problem in the grand jury proceedings in the district when prosecutional misconduct is alleged. *United States v. Griffith*, 756 F.2d 1244, 1249 (6th Cir. 1985); *United Sates* [sic] *v. Lamoureux*, 711 F.2d 745, 747 (6th Cir. 1983).

Affidavits of Attorneys Stephen H. Jigger and David O. Baur [sic] state that none of the documents provided to the Swiss government were given to the grand jury nor was the grand jury advised of any portion of the contents of those documents. Defendants' arguments on this ground must fail.

Defendant also seeks discovery of the documents given to Swiss authorities in order to persuade the Court to exercise

its supervisory powers to exclude unlawfully obtained evidence or to dismiss the indictment in order to preserve the integrity of the law enforcement process.

The United States Supreme Court in *United States v. Payner supra*, concluded:

> [T]he supervisory power does not authorize a federal court to suppress otherwise admissible evidence on the ground that it was seized unlawfully from a third party not before the Court. Our Fourth Amendment decisions have established beyond any doubt that the interest in deterring illegal searches does not justify the exclusion of tainted evidence at the instance of a party who was not the victim of the challenged practices.

As previously discussed, the bank records obtained by the government were not the property of Reuben Sturman. The records belonged to the bank and also were in the names of other individuals and Corporations. Therefore the Court's supervisory powers cannot be invoked.

The defendant's next contention is that the submissions of the United States to the Swiss authorities under the Treaty are material to defendant's objections to foreign records proposed for admission into evidence by the government under 18 U.S.C. §3505.

18 U.S.C. §3505(a)(2)(b) provides the procedure regarding foreign documents. The party wishing to introduce foreign documents into evidence must provide written notice of that intention to each other party. The opposing party must then file a motion opposing this evidence. This statute pertains to admission of evidence as opposed to suppression. The government has given defendant copies of the Swiss records it obtained. In order to determine whether to file a motion to exclude the evidence defendant need only review the records. The documents given by the United States to Switzerland to obtain bank records do not have any relevance to laying a foundation for the records nor their veracity. The admission of the records is subject to the admissibility restrictions found in the Federal Rules of Evidence. See 18 U.S.C. §3505(a)(1) and (2).

Defendant argues that the documents given by the United States to Switzerland which contained statements of Reuben Sturman's status as an organized crime figure are material to his defense and should be available for discovery.

In *United States v. Felt*, 491 F.Supp. 179 (D.D.C. 1979), the court set forth criteria for determining when documents are material for the preparation of a defense. These are: (1) there must be a strong indication that the documents will play an important role in uncovering admissible evidence; (2) aid witness preparation; (3) corroborating testimony; or (4) assisting impeachment and rebuttal. The documents given to the Swiss authorities are not of the type that can be used for the four criteria set forth in *United States v. Felt*.

Rule 16(a)(2) precludes discovery of reports, memoranda or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case. The documents in question were made in connection with the investigation of the defendant and are not discoverable under Rule 16.

Defendant suggests that the requested documents are discoverable pursuant to the Court's discretionary power to order disclosure. The defendant must show a need for discovery of material government files. The need must be readily apparent to the Court. *United States v. Germain*, 411 F.Supp. 719 (S.D. Ohio 1975). The Court has previously determined that defendant does not have a specific need for these documents. This argument is without merit.

Finally, defendant contends that the documents in question are discoverable under the Supreme Court's ruling in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Under *Brady* a prosecutor must disclose evidence favorable to the defendant, that if suppressed would deprive him of a fair trial. *United States v. Bagley*, ___ U.S. ___, 105 S.Ct. 3375 (1985). *Brady* material need not be produced until time of trial. *United States v. Candor*, 423 F.2d 904 (6th Cir. 1970). The *Brady* material must be disclosed to defendant in a timely manner to enable him to use it at trial. *Brady* may be invoked after trial. *United States v. Short*, 671 F.2d 178 (6th

Cir. 1982), cert. denied, 457 U.S. 1119, 102 S.Ct. 2932, 73 L.Ed.2d 1332 (1982). There is no denial of due process if the material is received in time to be effectually used at trial. Thus defendant's request for *Brady* material is premature.

Defendant also claims that the submissions to the Swiss authorities to obtain documents were prepared by government agents who may be called to testify. These submissions containing false information will become relevant for impeachment purposes. This argument is without merit at this time because of the Jencks Act, 18 U.S.C. §3505 [sic]. The Jencks Act provides that statements in the possession of the government may not be discovered until the witness has testified on direct examination.

Accordingly, for the reasons discussed above the report and recommendation of the Magistrate is rejected. The motions of Reuben Sturman, David Sturman and Mel Kamins for discovery of all documents and information submitted by the United States to the government of Switzerland in connection with the United States' efforts to gather evidence in this case and for discovery of all related documents IS DENIED.

IT IS SO ORDERED.

/s/ George W. White
George W. White
U.S. DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

UNITED STATES OF AMERICA	)	CR85-133
Plaintiff	)	ORDER
vs.	)	(Filed Jan. 16, 1987)
REUBEN STURMAN, et al.	)	
Defendant	)	

On December 4, 1985 the Court referred all pretrial motions in this case to the United States Magistrate for a report and recommendation pursuant to 28 U.S.C. §636(b)(1)(B) and Local Rule 19.08. The Court has received the magistrates's report and recommendation and the objections by the parties thereto as to the following motions.

1. Defendant Reuben Sturman's Motion to Dismiss Counts 7 through 15, paragraphs 7 and 8 on page 18 and paragraph 99 on page 40 of the Indictment Under the Self Incrimination Clause of the Fifth Amendment, and Request for Evidentiary Hearing.

2. Motion of Defendant Reuben Sturman to Dismiss Counts 7 through 16 and paragraph 7 on page 18 of the Indictment Under the Notice Clause of the Sixth Amendment and the Indictment Clause of the Fifth Amendment.

The Court has a reviewed the Magistrate's report and recommendations, the briefs submitted by the defendant and the government and the objections and responses filed by the parties to the objections. Upon consideration of these materials the Court makes the following orders.

IT IS HEREBY ORDERED that Defendant's motion to dismiss Counts 7 through 15, paragraphs 7 and 8 on page 18 and paragraph 99 on page 40 based on Fifth Amendment grounds is denied. Count 16 is dismissed without prejudice

because of failure to allege that the defendant acted "corruptly". Paragraphs 4 and 5 of Counts 13 and 14 are dismissed for failure to state an offense under the controlling statute's implementing regulation. Counts 7 through 15 are dismissed without prejudice because of failure to state sufficient facts to put defendant on notice of the specific offense charged. In addition Counts 12 and 15 are dismissed without prejudice for failure to cite applicable regulations found by the grand jury to be violated. Paragraph 99 is dismissed without prejudice for being composed in the disjunctive. The report and recommendation of the Magistratae IS ADOPTED with the addition that Count 15 has been dismissed without prejudice.

IT IS SO ORDERED.

/s/ George W. White
George W. White
U.S. DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA Plaintiff vs. REUBEN STURMAN, et al Defendants	CASE NO. CR85-133 HON. GEORGE W. WHITE ORDER (Filed Oct. 30 1987)

This matter is before the Court upon the motions of Reuben Sturman and Mevin [sic] Kamins in opposition to the introduction of records pursuant to the provisions of 18 U.S.C. §3505. The Court finds defendants' arguments as to the constitutionality of this statute to be without merit. A hearing as to the trustworthiness of certificates accompanying the foreign records will be held November 6, 1987 at 9:30 A.M. This hearing will also include rulings on the issues of appointment of an interpreter and the governments' motion to take depositions in Switzerland. All attorneys shall be present with their clients.

Accordingly, defendants Reuben Sturman and Melvin Kamins' motion concerning the constitutionality of 18 U.S.C. §3505 is denied.

IT IS SO ORDERED.

/s/ George W. White
George W. White
U.S. DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

UNITED STATES OF AMERICA Plaintiff vs. REUBEN STURMAN, et al Defendants	)	CASE NO. CR85-133 HON. GEORGE W. WHITE MEMORANDUM AND ORDER (Filed Nov. 4, 1987)

Defendant Reuben Sturman has filed a Motion To Dismiss the indictment or in the alternative, to suppress all evidence directly and derivatively obtained by the government by use of the Treaty for Mutual Assistance in Criminal Matters that was executed by the United States and Switzerland. The crux of the motion is that the government violated Sturman's constitutional rights by knowingly submitting false statements to Swiss authorities in order to obtain access to Swiss bank records. Defendant David Sturman has joined in this motion asserting that false statements made to the Swiss about Reuben Sturman lead [sic] to the acquisition of bank documents allegedly involving David Sturman in violation of his constitutional rights.

The government acquired information and documents from the government of Switzerland under the Treaty Between the United States and Switzerland on Mutual Assistance in Criminal Matters. This Treaty expressly provides that its terms do not apply to violations concerning taxes, the type of crime for which the defendants are charged. Chapter I Article 2, paragraph 1 (c)(5). An exception to this exclusion, Chapter II, Article 6 provides:

> 1. The Contracting Parties agree to assist each other in the fight against organized crime as provided in this Chapter and with all means otherwise

available under this Treaty and other provisions of law.

2. This Chapter shall apply only to investigations and proceedings involving a person who, according to the request, is or is reasonably suspected to be:

a. knowingly involved in the legal activities of an organized criminal group, described in paragraph 3, and who is:

1. a member of such a groups [sic]; or

2. an affiliate of such a group performing supervisory or managerial functions or regularly supporting it or its members by performing other important services; or

3. a participant in any important activity of such a group; or

b. a public official who has violated his official responsibilities in order to knowingly accommodate the desires of such a group or its members.

3. For the purpose of this Chapter the term "organized criminal group" refers to an association or group of persons combined together for a substantial or indefinite period for the purposes of obtaining monetary or commercial gains or profits for itself or for others, wholly or in part by illegal means, and of protecting its illegal activities against criminal prosecution and which, in carrying out its purposes, in a methodical and systematic manner:

a. at least in part of its activities, commits or threatens to commit acts of violence or other acts which are likely to intimidate and are punishable in both States; and

b. either:

1. strives to obtain influence in politics or commerce, especially in political bodies or organizations, public administrations, the judiciary, in commercial enterprises, employers' associations or trade unions or other employees' associations; or

2. associates itself formally or informally with one or more similar associations or groups, at least one of which engages in the activities described under subparagraph b(1).

Article 7 provides in part:

2. Assistance under this Chapter shall be rendered in investigations or proceedings involving violations of provisions on taxes on income . . . only if, according to the information furnished by the requesting State:

a. the person involved in the investigation or proceedings is reasonably suspected by it of belonging to an upper echelon of an organized criminal group or of participating significantly, as a member, affiliate or otherwise, in any important activity of such a group;

b. the available evidence is in its opinion insufficient, for the purpose of a prosecution which has a reasonable prospect of success, to link such person with the crimes committed by the organized criminal group with which he is connected in the sense of paragraph 2 of Article 6; and

c. it has been reasonably concluded by it that the requested assistance will substantially facilitate the successful prosecution of such person and should result in his imprisonment for a sufficient period of time so as to have a significant adverse effect on the organized criminal group.

In order to receive information under the Treaty, the government must comply with the above provisions. The government must represent to the Swiss officials that Reuben Sturman was either a member of the upper echelons of an organized criminal group or participated significantly in an important activity of an organized criminal group. Paragraph 1 of Article 8 of the Treaty requires that where a country is required to have a reasonable suspicion, conclusion or opinion of some activity, involvement or status before assistance will be rendered, then the requesting country must furnish

information in its possession on the basis of which such suspicion, conclusion or opinion has been arrived at. Sturman contends that in inducing the Swiss to turn over bank records, the United States falsely represented to the Swiss that he was a member of organized crime. Sturman insists that he is not and never has taken part in organized crime activities and the government is aware of this. Sturman bases the fact that the government is aware that he has no ties to organized crime on three official government reports on pornography and/or organized crime. He claims these reports conclude that Sturman is not directly connected with organized crime.

Article 8, Paragraph 2 of the Treaty provides:

> "The Central Authority of the requested State shall have the right to review the determination of the requesting State as to the applicability of this Chapter. It need not accept such determination where the suspicion, conclusion or opinion underlying such determination has not been made credible."

Article 37, Paragraph 1 states that restrictions in the Treaty shall not give rise to the right to suppress evidence or obtain other judicial relief. The contracting parties must determine whether the Treaty's provisions have been complied with. Whether or not the United States made a sufficient showing under the Treaty to obtain assistance is to be decided by the United States and Swiss authorities. This Court does not have jurisdiction to review the sufficiency of the governments' representations. An exception occurs if the governments' request for assistance contained deliberate factual misrepresentations.

It must be pointed out that the Treaty does not require the government to show that Reuben Sturman was a formal member of organized crime, only that he was reasonably suspected of being involved in the illegal activities of an organized criminal group and is an affiliate performing supervisory or managerial functions or regularly performing other important services or is a participant in any important activity of such a group and that the persons involved in the investigation reasonably be suspected either of belonging to an upper echelon of the organized criminal group or participating significantly

as an affiliate or otherwise in any important activity of the group. Thus the government does not need to show that Sturman was a member of organized crime, a much higher showing than actually is required.

The Attorney General's Commission on Pornography (July 1986) found that pornography is a major source of income for La Cosa Nostra and that it controls or directs production of pornography in Los Angeles where pornography is primarily produced. According to the report major distributors such as Sturman usually became involved with organized crime. An FBI source stated that it is practically impossible to operate on a retail basis in the pornography business without dealing with organized crime. Reuben Sturman was identified in the report as a Cosa Nostra Associate. The government asserts that the request was not limited to the information in the Commission's report. The reports certainly do not show that the government misrepresented facts in presenting evidence to the Swiss to obtain information under the Treaty.

Defendant Sturman claims that the government violated his Fourth Amendment rights when it submitted knowingly false statements in order to obtain bank records. Despite whether or not the Treaty prevents the defendant from raising constitutional issues in federal court, this Court has previously determined that the defendant was not deprived of his rights under the Fourth Amendment. The Court adheres to its determination of November 26, 1986 on this issue.

Sturman also argues that the government deprived him of his constitutional right to procedural due process when it falsely and secretly accused him of being a member of organized crime without affording him notice of the charges or any meaningful opportunity to respond to its secret accusations. Defendant believes he is entitled to a hearing to challenge the representations made by the government to Swiss authorities to obtain secret bank records.

In order for the defendant to be deprived of procedural due process under the Fifth Amendment he must show infringement of a protected property or liberty interest. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct.

2701, 33 L.Ed.2d 548 (1972). The United States Supreme Court in *Roth* stated that to have a property interest in a benefit, the defendant clearly must have more than an abstract need or desire for it. He must have a legitimate claim of entitlement to it.

Property rights are not created by the Constitution but from existing rules from an independent source such as state law that grant certain benefits. *Id* 408 U.S. at 577, 92 S.Ct. at 2709. The Court found in its Memorandum And Order of November 26, 1986 that the bank records are the property of the bank, not the individual depositor and Reuben Sturman did not have a reasonable expectation of privacy in those records. The Treaty itself cannot be considered as granting a property interest to defendant because Article 37 provides that the Treaty creates neither substantive rights nor a cause of action for judicial relief.

A protectible liberty interest is established when the defendant shows that the government voluntarily disclosed stigmatizing information about him. *Yashon v. Gregory*, 737 F.2d 547, 556, (6th Cir. 1984). If his reputation, honor or integrity is at stake because of the government's conduct toward him he is entitled to notice and a hearing to clear his name. *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 510, (1971). However more than mere damage to reputation by the government is needed for deprivation of a liberty interest. A right or status previously recognized must be altered or extinguished. *Paul v. Davis*, 424 U.S. 693, 711, 96 S.Ct. 1155, 1165, 47 L.Ed.2d 405 (1976). Sturman lost no personal freedom as a result of the government's representations to the Swiss to obtain the bank records. He is free to engage in bank transactions whenever he chooses.

The defendant must also show that the statements made about him which caused him to be severely stigmatized so as to constitute deprivation of a liberty interest were made publicly. *Yashon v. Gregory*, 737 F.2d at 556. None of the information given to the Swiss concerning Sturman has been made public. The Treaty requires that any information furnished in a request for assistance shall be treated as confidential. Article 8, Paragraph 1. Violation of due process seems to be civil

in nature and violation of this right would not result in dismissal of an indictment or suppression of evidence in a criminal case. Therefore defendant's claim of deprivation of a liberty interest under the Fifth Amendment is without merit.

Sturman's next argument is that his Fifth Amendment Right to indictment by an impartial grand jury was violated when the prosecutor introduced inflammatory and irrelevant evidence of organized crime before the grand jury. The government has presented the affidavit of Steven Jigger wherein he states that at no time during the grand jury investigation of Sturman or his co-conspirators were any documents connected with the request to the Swiss government given to the grand jury or taken into the grand jury room, nor was any testimony presented to the grand jury regarding the request for assistance to the Swiss authorities. This includes the grand jury panel which returned the indictment of June 27, 1985 and the grand jury which returned the superceding [sic] indictment on June 25, 1987. At no time during the grand jury's investigation was any evidence of Reuben Sturman's organized crime associations presented to the grand jury, nor were there ever any references made to organized crime in the presence of the grand jurors. The government indicates that although the application to the Swiss government contained grand jury materials it makes clear that only some of the information therein had been presented to the grand jury. Not all of the information given to the Swiss which contained materials as to Sturman's connections to organized crime was grand jury material.

Finally Sturman urges the Court to exercise its supervisory power to exclude evidence obtained through submission of knowing misrepresentations to the Swiss government. This supervisory power of the Court is to be applied with caution. *United States v. Payner*, 447 U.S. 727, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980). The Court quoted *Elkins v. United States*, 364 U.S. 206, 216, 80 S.Ct. 1437, 1443, 4 L.ed. 2d 1669 (1960). "[A]ny apparent limitation upon the process of discovering truth in a federal trial ought to be imposed only upon the basis of considerations which outweigh the general need for untrammeled disclosure of competent and

relevant evidence in a court of justice." *Id* 447 U.S. at 735, 100 S.Ct. at 2446. As previously stated, Sturman bases his claim that the government made misrepresentations to the Swiss government on several government commission reports. However the Court found that although the reports did not relate that Sturman was a member of organized crime, a fact the government did not have to show, the reports did demonstrate some connection. If these reports were submitted or information contained therein, it may be sufficient to obtain assistance under the Treaty. The Treaty requires that the Swiss government, the requested country, determine whether the information supplied to obtain assistance was sufficient. Therefore, even if more information was given, defendant has not shown that the government knowingly made misrepresentations to receive assistance under the Treaty.

The evidence obtained from the banks did not belong to Sturman. They are the property of the banks and were not illegally seized. Sturman will have the opportunity to challenge their admissibility on other grounds. Defendant has not shown that the government has made misrepresentations to receive assistance from the Swiss authorities. The Commission reports relied on by defendant show that Sturman has some connection to organized crime and do not show that the government was aware that Sturman had no ties to organized crime at all. The Court's supervisory power should not be used.

Since the Court has ruled that Reuben Sturman has not shown that the government violated his constitutional rights in obtaining information under the Treaty with the government of Switzerland, David Sturman's motion to dismiss is without merit.

Accordingly, the motions of defendants Reuben Sturman and David Sturman to dismiss or in the alternative to suppress are denied.

IT IS SO ORDERED.

/s/ George W. White
George W. White
U.S. DISTRICT JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA Plaintiff vs. REUBEN STURMAN, et al Defendants	CASE NO. CR85-133 HON. GEORGE W. WHITE MEMORANDUM AND ORDER (Filed Feb. 9, 1988)

On October 30, 1987 this Court denied the motions of defendants Sturman and Kamins concerning the constitutionality of 18 U.S.C. §3505. A hearing on the trustworthiness of the documents received from Switzerland was held on November 6, 1987 and concluded on November 16, 1987. The Court has examined the documents and relying on *United States v. Miller*, 830 F.2d 1073 (9th Cir 1987), finds them to be trustworthy.

The Court in *Miller* was faced with the same issue involved in this court; i.e., whether §3505 violates the Confrontation Clause of the Sixth Amendment. The documents in *Miller* consisted of Swiss bank records accompanied by statements made under criminal penalty for falsity by bank employees. The Court found that although having an attestation before a judge or public prosecutor is preferred to the practice of swearing before a notary and that a high bank officer is preferred to a simple employee, each bears indicia of reliability. The admission of business records is a common exception to the hearsay rule. *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). "Firmly-rooted exceptions to the hearsay rule do not offend the Confrontation Clause.["] *Bourjailly v. United States*, ___ U.S. ___, 107 S.Ct. 2775, 2783, 97 L.Ed.2d 144 (1987). The Court in *Miller* further stated that banks depend on keeping accurate records and their records are the most common type of business

records used in Court. As in *Miller*, Sturman and Kamins have not suggested a motive for bank officials to falsify the records. The recordkeepers in *Miller* asserted under criminal penalties in their own country that the records were kept in the course of business. If *Miller* felt the records were inaccurate he could depose the recordkeepers and challenge the records.

The Court has examined the documents contained in the Appendix to defendant Reuben Sturman's motion in opposition to the introduction of records pursuant to the provisions of 18 U.S.C. §3505. These included documents from the Algemene Bank of Nederland N.V., Swiss Bank Corporation, Union Bank of Switzerland, Credit Suisse, Zurich, Libra Bank, Ltd, London, First Interstate Bank of California in London and Barclays Bank Ltd., Jersey, Channel Islands. The documents from the Swiss bank include a certificate of Authority Executing United States Request for Documents from a District Attorney with a Certificate [of] Authenticity from the bank employee stating that the records were received and kept in the ordinary course of business and made at the time of the act or transactions recorded in them or within a reasonable time afterwards. The London bank records include statements from the bank officials and statements on oaths that their statements are true. The statements each declare the necessary declaration required for admittance of business records. The Algemene Bank of Nederland submitted a Certificate of Authenticity of Business Records from the Bank manager who made the necessary statements under oath. The records from Barclays Bank were submitted through Barrie Ian Davis, representing Barclays Bank, through a letter rogatory. Davis was asked questions presented by the United States by an Assistant Magistrate. The Assistant Magistrate asked Davis the necessary questions for admittance of business records and Davis gave satisfactory answers. If the defendants believe the records to be inaccurate, they may challenge them by deposing the recordkeepers. *See U.S. v. Miller*, 830 F.2d at 1078.

Accordingly, the Court finds the documents to be properly authenticated to be admissible as business records.

IT IS SO ORDERED.

/s/ George W. White
George W. White
U.S. DISTRICT JUDGE

APPENDIX H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. CR 85-133
JUDGE GEORGE W. WHITE

UNITED STATES OF AMERICA,
Plaintiff,

v.

REUBEN STURMAN, *et al.*,
Defendants.

[Filed Aug. 12, 1985]

MOTION FOR PRE-TRIAL DEPOSITIONS
OF WITNESSES LOCATED IN SWITZERLAND

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* * * *

Motion granted.

It is so ordered.

/s/ G. White
8-25-88

APPENDIX I

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. CR 85-133
HON. GEORGE W. WHITE

UNITED STATES OF AMERICA
Plaintiff

vs.

REUBEN STURMAN, *et al.*
Defendants

[Filed Feb. 9, 1989]

ORDER

On December 19, 1988 defendant Reuben Sturman filed an Administrative Court complaint with the Swiss Federal Tribunal, wherein he appealed the November 19, 1989 decision of the Swiss Federal Office for Police Matters dismissing Reuben Sturman's objections to the taking of depositions in Zurich, Switzerland. Because of this appeal and the need for these depositions the trial scheduled for February 21, 1989 is continued to on or about June 5, 1989. The depositions that are to be taken in Switzerland will be rescheduled to on or about April 24, 1989 or as soon thereafter as can be arranged with the Swiss Magistrate. A status hearing is scheduled for March 20, 1989 at 1:30 P.M.

IT IS SO ORDERED.

/s/ George W. White
GEORGE W. WHITE
U.S. DISTRICT JUDGE

APPENDIX J

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. CR 85-133
JUDGE GEORGE W. WHITE

UNITED STATES OF AMERICA,
Plaintiff,

v.

REUBEN STURMAN, *et al.*,
Defendants.

[Filed Mar. 20, 1989]

ORDER

IT IS HEREBY ORDERED:

The United States of America shall reimburse travel and subsistence expenses incurred by the defendants and one attorney for each defendant while attending depositions in Zurich, Switzerland, subject to the limitations set forth in the regulations governing official travel by employees of the Department of Justice.

/s/ George W. White
UNITED STATES DISTRICT
COURT JUDGE
March 20, 1989

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

REUBEN STURMAN, *et al.*,
Defendants.

Judge White
CR85-133

TRANSCRIPT OF PROCEEDINGS HAD BEFORE THE HONORABLE GEORGE W. WHITE, JUDGE OF SAID COURT, ON TUESDAY, APRIL 25, 1989 COMMENCING AT 1:30 O'CLOCK P.M.

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* * * *

[7] THE COURT: Excuse me just a minute. Let's
[8] bring this to a close.

I said originally that the depositions may go forward. They still may go forward.

The next thing to decide after they go forward is you may argue whether or not you have been denied any rights or anything else, but they will go forward.

The Government will pay for the expense, as you said, and then we will decide whether or not you had any problems that would deny you some constitutional right in this case.

* * * *

[29] THE COURT: . . . I don't think I have to put in an order. You know what the Magistrate wants. You should be able to know what the Magistrate wants because he told you what he thinks the Magistrate wants, and you can contact the Magistrate on your [30] own.

MR. JIGGER: And so there is no misunderstanding from the parties, if they don't wish to follow the orders of the Magistrate, they do so at their own peril.

THE COURT: They do so at whatever I say.

MR. JIGGER: Exactly, your Honor.

THE COURT: If I feel the Magistrate has given you every right that you were entitled to, and that the testimony should be heard, then I'll make that decision.

But I'll reach that bridge when I get to it. Take advantage of everything you can take advantage of at this point. That's the only thing I can tell you.

* * * *

[35] MR. JIGGER: It's my understanding that the Swiss do not allow the Court Reporter. It will be taken down by a Swiss Court Reporter in German and then the transcript will be provided.

THE COURT: I understand that. But I want a Court Reporter over there in case counsel want to make a record through our Court Reporter later or during the proceedings or whatever, the official Court Reporter. I think that probably should be important to do.

* * * *

APPENDIX L

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. CR 85-133
JUDGE GEORGE W. WHITE

UNITED STATES OF AMERICA,
Plaintiff,

v.

REUBEN STURMAN, *et al.*,
Defendants.

[Filed May 4, 1989]

ORDER

On April 11, 1989, the Swiss Supreme Court denied all oppositions filed concerning the Swiss depositions previously ordered by this Court. In view of the need for these depositions, the trial scheduled for June 5, 1989 is continued until September 5, 1989; the Swiss depositions are scheduled before Magistrate Holdener in Zurich, Switzerland for the week of June 5-9, 1989.

With respect to the Swiss depositions:

1. All parties wishing to examine and/or cross-examine Messrs. Schlaeppi; Meier, Bruner, Perrelet, and Schmid shall be present at the proceedings conducted by Magistrate Holdener in Zurich on June 5-9, 1989;

2. All parties wishing to conduct direct examination (as opposed to cross-examination) of the witnesses shall

submit written questionnaires to Magistrate Holdener by May 22, 1989;

3. Each defendant shall provide to the government the names of all persons attending the depositions on his or her behalf by May 12, 1989 so as to enable the government to obtain the necessary travel authorizations and to enable the Swiss magistrate to reserve an appropriate facility;

4. Subject to the limitations set forth in paragraph 5, below, the government shall pay the travel and subsistence expenses incurred by the defendants and one attorney for each defendant and by a law clerk, court reporter, and interpreter designated by the Court;

5. All individuals attending the depositions at government expense are traveling on official government business and are subject to the terms and limitations set forth in the Federal Travel Regulations (FPMR 101-7), including, but not limited to, the requirements that individuals must fly on a United States flag carrier (Title 46, U.S.C. § 1517; FPMR 101-7, chapter 1-3.6), must fly at less than first-class rates (FPMR 101-7, chapter 1-3.3d(1)), and must fly on the government's contract carrier service (FPMR 101-7, Chapter 1.2.1c(1)(a)(i)). Individuals wishing to have the government pay their air transportation expenses in advance must submit to the government, by May 10, 1989, their dates of departure and return to enable the government to make the necessary arrangements. The government will then make the air reservations and purchase the airline tickets. Once the tickets are purchased, individuals may, at their own expense, upgrade the tickets for higher fare tickets with the contract carrier. Individuals wishing to purchase their own tickets may do so, but will receive reimbursement after returning from Switzerland only to the extent they comply with the requirements of FPMR 101-7. Meal and lodging expenses will be reimbursed by the govern-

ment after return from Switzerland at the maximum per diem rate applicable to official government travel to Zurich, Switzerland during the week of June 5-9, 1989. The government shall notify the parties of the applicable per diem rate for the week of June 5-9, 1989, as soon as the United States Department of State sets the rates for that week.

IT IS SO ORDERED.

/s/ George W. White
HONORABLE GEORGE W. WHITE
United States District Court Judge
May 4, 1989

APPENDIX M

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. CR85-133
HON. GEORGE W. WHITE

UNITED STATES OF AMERICA
Plaintiff

vs.

REUBEN STURMAN, *et al.*
Defendants

[Filed May 5, 1989]

ORDER

Pursuant to the Court's Order of May 4, 1989 concerning travel to Switzerland for depositions;

IT IS HEREBY ORDERED THAT the following persons are designated to travel to Switzerland on behalf of this Court: Jeffrey Lichtman, Law Clerk; Francine Salopek, Court Reporter; and Maria Neiden, Court Interpreter.

IT IS SO ORDERED.

/s/ George W. White
GEORGE W. WHITE
U.S. DISTRICT JUDGE

APPENDIX N

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Case No. CR85-133
Plaintiff,	)	ORDER
v.	)	(Filed Aug. 30, 1989)
REUBEN STURMAN, et al.,	)	
Defendants.	)	

Upon consideration of the defendants' motions to dismiss Count One of the superceding [sic] indictment:

Said motions are OVERRULED.

/s/ George W. White
George W. White
United States District Judge

APPENDIX O

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

UNITED STATES OF AMERICA Plaintiff vs. REUBEN STURMAN, et al. Defendants	)	CASE NO. CR85-133 HON. GEORGE W. WHITE MEMORANDUM AND ORDER (Filed Sept. 6, 1989)

On May 18, 1989 the Sixth Circuit Court of Appeals decided *United States v. Minarik*, 875 F.2d 1186 (6th Cir. 1989). Based on this decision, the defendants, Reuben Sturman, David Sturman, Melvin Kamins, Ralph Levine and Paula Lawrence have filed motions to dismiss Count One of the superceding [sic] indictment which charges a conspiracy to violate Title 18, United States Code Section 371. Count One of the superceding [sic] indictment charges the defendants with unlawfully, knowingly and willfully conspiring to defraud the United States by hampering, hindering, impeding, impairing, obstructing and defeating lawful governmental functions of the Internal Revenue Service in the ascertainment, computation, assessment and collection of income taxes.

18 U.S.C. § 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

In *United States v. Minarik* the Sixth Circuit Court of Appeals determined that the first sentence of § 371 has been read in the disjunctive to create a crime of conspiracy to commit an "offense" against the United States that is distinguishable from the crime of conspiracy to "defraud" the government. There are two types of conduct included in § 371. The first constitutes conspiracies to commit an offense specifically defined in the federal criminal code while the second category covers conspiracies to defraud the United States. The Court in *Minarik* held that when conduct is covered by a specific offense found in the federal criminal code the indictment is required to refer to the specific criminal statute that defines the object of the conspiracy. The defendants contend that, pursuant to *United States v. Minarik*, the indictment must be dismissed for failure to charge under the offense clause of § 371 because the defendants' conduct is covered by 26 U.S.C. § 7206(4) or § 7201.

> 26 U.S.C. § 7206 states: Any person who –
> (4) removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title; . . . shall be guilty of a felony.

26 U.S.C. § 7206(4) requires assessment notice and demand before it becomes operative. *United States v. Swarthout*, 420 F.2d 831, 833-834 (6th Cir. 1970). The conduct of the defendants in *Minarek* [sic] occurred after receipt of notice of assessment for taxes owed. In contrast, there has been no assessment, notice or demand for payment of Reuben Sturman's taxes. Pre-assessment concealment of taxes is not covered in the criminal code. *United States v. Minarik*, 875 F.2d

at 1194. Therefore, defendants' first argument is without merit.

26 U.S.C. § 7201 states:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony . . . .

Under § 7201 the conspirators must willfully agree to promote a scheme intending to deprive the government of substantial revenue from a particular taxpayer. The essence of the charge to defraud the Internal Revenue Service under § 371 is the interference with the governmental process of ascertaining, computing, assessing or collecting taxes without regard to whether the taxes are in fact due and owing. 18 U.S.C. § 371 includes any conspiracy for the purposes of impairing the lawful function of the government. Loss of government funds is not essential. See *United States v. Johnson*, 383 U.S. 169, 172, 86 S. Ct. 749, 751, 15 L.Ed.2d 681 (1966). A conspiracy charge that alleges interference with the functions of the IRS regardless of whether the taxpayer owes additional tax cannot be prosecuted under 18 U.S.C. § 7201. Therefore, the existence of § 7201 does not preclude a conspiracy charge under the defraud clause of § 371.

Defendants also argue that the defraud clause of 18 U.S.C. § 371 is unconstitutionally vague. The Ninth Circuit Court of Appeals has held that a statute is unconstitutionally vague if a person of average intelligence would not reasonably understand that his conduct is prohibited. *United States v. Little*, 753 F.2d 1420, 1443 (9th Cir. 1984). A statute will not be considered vague when judicial explanation provides sufficient clarity to afford fair notice. *Id* at 1443, quoting *United States v. Bohonus*, 628 F.2d 1167, 1174 (9th Cir. 1980). The Court in the *Little* case found that the United States Supreme Court had determined that the defraud clause of § 371 covers any conspiracy for the purpose of impairing, obstructing or defeating the lawful functions of a government agency. See *Dennis v. United States*, 384 U.S. 855, 86 S. Ct. 1840, 16 L.Ed.2d 973 (1966). In addition, the fact that § 371 requires specific intent would preclude a conviction of an

accused for a crime of which he was unaware. *United States v. Little*, 753 F.2d at 1443. The Sixth Circuit has also upheld convictions under the defraud clause of § 371. See *United States v. Shermetaro*, 625 F.2d 104 (6th Cir. 1980), *United States v. Jerkins*, 871 F.2d 598 (6th Cir. 1989). As in *Jerkins* the indictment in the present case charges that the object of the conspiracy was to impede the lawful functions of the United States Treasury by the concealment of income and assets of Reuben Sturman through the use of unreported corporate cash receipts, the use of fictitious names, sham financial transactions and various other means.

Accordingly, the motions of defendants Reuben Sturman, David Sturman, Melvin Kamins, Ralph Levine and Paula Lawrence to dismiss Count One of the superceding [sic] indictment are denied.

IT IS SO ORDERED.

/s/ George W. White
George W. White
U.S. DISTRICT JUDGE

APPENDIX P

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Criminal Action No. CR85-133

Judge George W. White
Cleveland, Ohio

UNITED STATES OF AMERICA,
Plaintiff,

vs.

REUBEN STURMAN, DAVID A. STURMAN and
RALPH L. LEVINE, *et al.*,
Defendants.

TRANSCRIPT OF PROCEEDINGS HAD BEFORE
THE HONORABLE GEORGE W. WHITE,
JUDGE OF SAID COURT, AND A JURY,

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* * * *

[4295] TUESDAY, OCTOBER 24, 1989, 9:30 A.M.

(The following proceedings were had out of the presence and hearing of the jury:)

THE COURT: Good morning. Be seated, please. As to the motion to suppress evidence obtained pursuant to the Swiss Assistance Treaty filed by David Sturman and joined by the defendant Mr. Levine, the Court will deny that motion under Article 37 of the Treaty entitled Review of Determinations.

It expressly provides that, "Any restriction imposed by the treaty upon the governments of the United States and Switzerland create no substantive rights enforceable by the defendants in this case."

And the Court feels that whether or not the United States government is observing its treaty obligations is an issue solely before the governments of the United States and Switzerland as to matters of international relations. Assuming that Article 37 does not bar the motion, however, the substantive provisions of Article 5, Section 2(B) of the Treaty independently defeat the motion in that the defendants are only charged in Count I of the indictment.

As to the motion to admit into evidence the deposition testimony of the four individuals who were deposed in Switzerland as filed by the government, the Court has reviewed the translations of those documents. We [4296] have listened to what counsel have told us took place in Switzerland.

It appears that counsel are right when they say that the court reporter that the Court sent over there was not permitted to take stenographic notes at least. I can understand there may have been some confusion about her even taking notes. However, the issue really to be decided is whether or not the procedure as followed by the magistrate over there comported with our constitutional provisions taking depositions, due process, Sixth Amendment and other constitutional rights.

And in looking at the law that has been referred to this Court concerning this matter, and in looking at the procedure that was followed in that, the Court finds that the defendants were entitled to be present there, they were entitled to have counsel there, counsel for the government were entitled to have questions read, and it appears to me that counsel for the defendants were entitled to submit questions to the magistrate for answers by the witnesses.

So it appears to me that the procedure that was used, that there was a right to confront witnesses that comports with due process and our constitutional guarantees.

Insofar as the oath taking, as I read the transcript here it appears that the witnesses who testified were [4297] expressly admonished to provide truthful information with respect to their observations and their knowledge in the matter, and they were also told that he who intentionally makes a false statement, that is knowingly and intentionally in a legal proceeding as a witness, expert witness, translator or interpreter, or who provides false evidence or false opinion or who translates incorrectly will be punished because of false evidence pursuant to Article 307, Section 1 of the Penal Code with a term of imprisonment of up to five years.

Even though in our system if we have someone take an oath, it appears to me this process accomplishes the kind of thing that is intended and therefore it is not infirmed [*sic*] because of this, because the process that is used whereby the magistrate poses the questions and makes a summary to the translator, that in itself does not make the process infirmed [*sic*] in my opinion.

It appears to me also—and I may be wrong about this —it appears to me, Mr. Murray, you were the only one asking questions.

MR. MURRAY: On the defense side.

THE COURT: Yes.

MR. MURRAY: Yes. That's correct, your Honor.

THE COURT: Is that correct?

[4298] MR. MURRAY: Not unlike what has occured in this courtroom.

THE COURT: Yes, I understand. Insofar as the objection raised by Mr. Murray concerning the identification of Mr. Sturman by one of the witnesses in which it appears that the witness was told to go to a particular table to see if he could identify Mr. Sturman, although the Court would not allow that in its courtroom, it appears to me when I see the number of people that were

present at that table, that does not cause a taint, in my opinion, in the identification.

As to the bias of the examining officer, I have looked at the transcript. I do not feel that defense has made a case of bias in this instance when I look at the questions that are propounded and the answers given, and it appears to me that again when I see that the defense were in the position to ask questions, and as I read the instructions of the magistrate before we started, it appears—and I won't read those; they are in the record—it appears to me that there was a sufficient chance for cross-examination and confrontation of witnesses.

It appears also to this Court that to rule otherwise—and also I want it known that I think the law, case law that I have read and I agree with it, each case [4299] has to stand on its own merits. But it would appear to me that with foreign jurisdictions that have certain restrictions, what have you, you would never be able to have needed testimony in some cases if you took a position otherwise.

For these reasons, the motion of the government to admit into evidence the deposition testimony will be granted subject to counsel being heard as to parts that you feel that are—you wish to raise objections to.

* * * *

APPENDIX Q

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

United States of America	:	Case No. CR85-133
Plaintiff	:	Magistrate
	:	David S. Perelman
v.	:	Judge
Reuben Sturman, et al.	:	George W. White
	:	REPORT &
Defendant	:	RECOMMENDATION
	:	(Filed Aug. 21, 1986)

Reuben Sturman has moved for "discovery of all documents and information submitted by the United States to the government of Switzerland in connection with the United States' efforts to gather evidence in this case and for discovery of all related documents."[1] Similar motions have been filed by defendants David Sturman and Mel Kamins. The most extensive briefing has been in the context of Reuben Sturman's motion, the government relying upon its response to that motion as its opposition to the other two, and the matter will be considered in the context of that motion for purposes of this Report and Recommendation.

This motion goes to evidence obtained by the United States government from Swiss banks through the government of Switzerland pursuant to a "Treaty Between The United States And The Swiss Confederation For Mutual Assistance In Criminal Matters" (hereinafter the Treaty). That material appears to be central to the government's proofs under the instant indictment, and if the defense could preclude its introduction as trial evidence the prosecution's case would, at the very least, be significantly impaired if not fatally undermined.

In the parties' briefs it is recognized that prior to consumation [sic] of the Treaty it was virtually impossible under

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[1] The material sought thereunder is more specifically designated in four categories at pages 1 and 2 of the motion.

Swiss law to obtain information from Swiss banking authorities for use as evidence in a criminal prosecution, or for any other purpose for that matter. The Treaty, entered into on May 25, 1973, provides some clearly defined exceptions to that cloak of secrecy.

As a general proposition the Treaty is not applicable to alleged tax violations, Chapter I, Article II, Paragraph 1(c)(5). There is, however, an exception to that exemption. The Treaty further provides at Chapter I, Article II, Paragraph 2:

> Nevertheless, assistance shall be granted if a request concerns an investigation or proceeding referred to in subparagraphs c.(1), (4) and (5) of paragraph 1, if made for the purpose of investigating or prosecuting a person described in paragraph 2 of Article VI and . . .
>
> b. in the case of subparagraph c.5, any applicable conditions of Article 7 are satisfied.

Chapter II of the Treaty is headed "Special Provisions Concerning Organized Crime". Article 6, the first provision thereof, reads in full text:

> 1. The Contracting Parties agree to assist each other in the fight against organized crime as provided in this Chapter and with all means otherwise available under this Treaty and other provisions of law.
>
> 2. This Chapter shall apply only to investigations and proceedings involving a person who according to the request, is or is reasonably suspected to be:
>
> a. knowingly involved in the illegal activities of an organized criminal group, described in paragraph 3, and who is:
>
> (1) a member of such a group; or
>
> (2) an affiliate of such a group performing supervisory or managerial functions or regularly supporting it or its members by performing other important services; or

(3) a participant in any important activity of such a group; or

b. a public official who has violated his official responsibilities in order to knowingly accomodate the desires of such a group or its members.

3. For the purpose of this Chapter the term "organized criminal group" refers to an association or group of persons combined together for a substantial or indefinite period for the purposes of obtaining monetary or commercial gains or profits for itself or for others, wholly or in part by illegal means, and of protecting its illegal activities against criminal prosecution and which, in carrying out its purposes, in a methodical and systematic manner:

a. at least in part of its activities, commits or threatens to commit acts of violence or other acts which are likely to intimidate and are punishable in both States; and

b. either:

(1) strives to obtain influence in politics or commerce, especially in political bodies or organizations, public administrations, the judiciary, in commercial enterprises, employers' associations or trade unions or other employees' associations; or

(2) associates itself formally or informally with one or more similar associations or groups, at least one of which engages in the activities described under subparagraph b(1).

Article VII, insofar as pertinent to this action, provides:

2. Assistance under this Chapter shall be rendered in investigations or proceedings involving violations of provisions on taxes on income . . . only if, according to the information furnished by the requesting State:

a. the person involved in the investigation or proceeding is reasonably suspected by it of belonging to an upper echelon of an organized criminal group or of participating significantly, as a member, affiliate or otherwise, in any important activity of such a group;

b. the available evidence is in its opinion insufficient, for the purpose of a prosecution which has a reasonable prospect of success, to link such person with the crimes committed by the organized criminal group with which he is connected in the sense of paragraph 2 of Article 6; and

c. it has been reasonably concluded by it that the requested assistance will substantially facilitate the successful prosecution of such person and should result in his imprisonment for a sufficient period of time so as to have a significant adverse effect on the organized criminal group.

It would thus appear that in order for the United States to obtain the assistance of Switzerland in obtaining evidence under the Treaty concerning alleged violations of the tax laws it was incumbent upon the United States, as the requesting party, to demonstrate to the satisfaction of the appropriate Swiss authorities[2] that during the relevant time period Reuben Sturman was or was reasonably believed to be:

1) knowingly involved in the illegal activities of an "organized criminal group", as that term is defined in the treaty, as either –

(a) a member of the group,

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[2] Under the Treaty requests are processed through a Central Authority, which for Switzerland is the Division of Police of the Federal Department of Justice and Police in Bern (Chap. VII, Art. 28(1)).

(b) an affiliate providing some supervisory, managerial, regular support or other important service to the group, or

(c) a participant in any important activity of the group, and

2) an upper echelon member of such group or participating significantly in some fashion in any important activity of such a group.

Satisfaction of that obligation would include the subsidiary demonstration that the organized criminal group with which the defendant was allegedly allied came within the purview of the definition of Article 6, paragraph 3. Further, a showing would be called for that the available evidence was insufficient to link Mr. Sturman with crimes committed by the organized criminal group with which he is alleged to be connected and that the requested assistance should facilitate his prosecution and result in his imprisonment for a sufficient period of time so as to have a significant adverse effect on the organized criminal group.

In the course of briefing this motion government counsel offered to provide the material submitted to the Swiss authorities for *in camera* inspection. The government's initial submission, on the face of the documents tendered, included both documents tendered to the Swiss authorities and internal documents between United States law enforcement and/or investigative agency representatives. It was also represented at that time by government counsel that there were additional documents which had to be retrieved to complete the file of material provided the Swiss authorities. This Magistrate returned that original submission to government counsel with directions to segregate out the documents not forwarded to Switzerland and to return the file when fully reconstructed. That submission has been tendered, and is transmitted herewith.[3]

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[3] This Court has some reservations as to the completeness of that packet. From a reading of certain of the materials it would appear that generalized references are made to other submissions which were not plainly identifiable by this Court with any documents as reviewed.

In the course of defendant's brief alternative grounds are asserted as to the relevance of the discovery sought. Foremost among those is the contention that the defendant is not a member of organized crime, and that any representations to the contrary made by the United States authorities to the Swiss authorities in order to bring the request for assistance within the narrow exception applicable to tax prosecutions would have to have been false. Proceeding from the premise that he could prove the unreliability of any such representations, the defendant advances several legal theories in support of the position that such false representations would result in the rejection of any evidence obtained through the Swiss authorities or deriving therefrom.

The government responds that the defendant's position as to the representations made to the Swiss government is pure speculation, and that absent some showing that false or unreliable information was conveyed the defendant cannot be said to have satisfied the requisite of Rule 16 of the Federal Rules of Criminal Procedure – that the documents sought "are material to the preparation of his defense." The government also challenges the legal theories advanced by the defendant as to his standing and ability to have the evidence in question suppressed or excluded at trial.

The government's contention that the defendant has not made a sufficient showing that the information conveyed to the Swiss authorities was false and/or unreliable or did not conform with and/or satisfy the requisites of the Treaty presents a classic "Catch-22" proposition. On the one hand, the defendant is to be precluded from discovery because he cannot demonstrate materiality, in that he cannot state with any certainty in what respects the documents sought would demonstrate falsity or lack of satisfaction of the Treaty's requirements. On the other hand, he cannot make such a demonstration without having access to the documents in question. And so it goes, on and on, in an endless circle.

In this Court's opinion, denying a defendant the right to determine whether the United States Government has complied with an international treaty in seeking evidence against him is inconsistent with the basic tenets of our jurisprudence,

particularly when such denial would itself arise from the lack of access to the material sought. This Court finds the analogy drawn by defendant between the affidavit submitted by law enforcement officers seeking a domestic search warrant and submisions [sic] by the requesting state under the Treaty to be an apt one. Each is intended to demonstrate to a neutral third person that violations of the criminal laws have occurred and that law enforcement officials have a legitimate basis for invoking the powers of the sovereignty in order to obtain further evidence of such crimes. There is no doubting the right of a defendant to be informed of the basis upon which a search warrant was requested and issued, nor of his right to challenge the truthfulness and/or sufficiency of the averments made in the affidavit. Although the fact that this proceeding is pursuant to an international treaty may effect the nature of the challenges sustainable by the defendant, this Court cannot perceive of any valid reason why the same threshhold [sic] right of knowing what allegations have been made in support of the attempt to gather evidence should not be accorded in each instance.[4]

With regard to the legal theories considered by the parties in their briefs concerning the defendant's ability to obtain an order resulting in the exclusion of the evidence generated under the Treaty and consequent thereto, it appears that many of the questions raised may represent complex issues of first impression. While they have been addressed in more than a perfunctory manner, in this Court's opinion it would be premature to attempt any definitive rulings at this time and in this context. Given the significance of the issues raised and

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[4] Without intending to impugn the integrity of the government's motivation, the defendant's observation that the prosecution's determined resistance to disclosure, both here and in proceedings brought by defendant in Switzerland for that same purpose, could cause a reasonable person to wonder if there is something to hide is not without some facial attraction. It is noted that there may be some inconsistency between statements made by the Swiss courts as to representations made by the Justice Department as to the defendant's rights of discovery in this action and the position taken by the government herein.

their facial novelty a much more comprehensive exposition, based upon a definitive record, would be in order.[5] Nevertheless, this Court is well satisfied that the defendant has demonstrated that a reasonable possibility exists that he will be able to present a sustainable challenge, depending upon the facts which may be revealed by the discovery at issue.

Although the parties' briefing and this opinion have concentrated on the documents submitted to the Swiss government as the factual focus, the defendant's motion reaches well beyond those documents. While it may be that at some point the defendant can establish entitlement to more than the documents exchanged between the two governments, the necessity for that discovery can be better determined after the defendant has been provided with the core documents and can clearly articulate any further position based thereon.

It is, therefore, recommended that the defendant's motion be granted with regard to the documents provided for *in camera* inspection, and be held in abeyance in all other particulars pending a further detailed demonstration of materiality.

/s/ David S. Perelman
DAVID S. PERELMAN
United States Magistrate

Dated: August 21, 1986

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[5] Further, this Court is not satisfied that all the potential critical issues have been presented. For, example, the question of to what extent and in what manner the Swiss authorities [sic] acceptance of the American submissions may be challenged, or second-guessed, has not been extensively directly explored.

APPENDIX R

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

United States of America	:	Case No. CR85-133
	:	Magistrate
Plaintiff	:	David S. Perelman
	:	Judge
v.	:	George W. White
Reuben Sturman, et al.	:	REPORT & RECOMMENDATION
Defendants	:	(Filed Oct. 28, 1986)

Defendant Reuben Sturman has moved to dismiss Counts Seven through Sixteen and Paragraphs Seven on page eighteen and Ninety-Nine on page forty of the Indictment on a variety of grounds, some of broad applicability and others more specifically directed.[1] Certain of the challenges presented are of a nature that if found to be meritorious the order of dismissal would preclude further prosecution, while others attack the formal adequacy of the allegations of the indictment and conceivably could be cured in a superceding [sic] indictment.

Counts Seven through Eleven charge the same offense, varying in the years they pertain to. Count Seven charges:

> That on or about July 6, 1979, in the Northern District of Ohio, REUBEN STURMAN, a resident of Shaker Heights, Ohio, did willfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar

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[1] Although presented in two motions the issues thus raised will all be addressed in this memorandum. The motion raising the Fifth Amendment challenge carries in its caption a "request for evidentiary hearing", and in the body represents that "At the evidentiary hearing, defendant proposes to establish facts upon which no similar Fifth Amendment challenge to those specific statutes and regulations has been made." In this Court's opinion the consitutional [sic] issues raised by this motion represent pure issues of law, as to which the holding of a pretrial evidentiary hearing would be inappropriate.

year 1978 which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said United States Individual Income Tax Return, Form 1040, he did not believe to be true and correct as to every material matter is that the said return did not accurately report either his gross income or interest in, or signature authority over a foreign bank, securities or financial account in a foreign country;

In violation of Title 26, United States Code, Section 7206(1).

Count Eight relates to the calendar year 1979, Count Nine to 1980, Count Ten to 1981 and Count Eleven to 1982.

Count Twelve charges the defendant as follows:

1. That during the year 1979 REUBEN STURMAN engaged in transactions with and maintained a relationship, directly and/or indirectly, on behalf of himself and another with a foreign financial institution.
2. By virtue of the relationship set forth in paragraph 1, REUBEN STURMAN was required to maintain records and file reports pursuant to Title 31, U.S.C., Section 1121 (recodified as Title 31, U.S.C., Section 5314) and the regulations promulgated thereunder.
3. That REUBEN STURMAN failed to maintain records and file reports pursuant to Title 31, U.S.C, Section 1121 (recodified as Title 31, U.S.C., Sections 5314) and the regulations promulgated thereunder.
4. That the transactions alleged in paragraph 1 of this count, and the failure to maintain records and file reports as alleged in paragraph 3 of this count, were committed in furtherance of a conspiracy to defraud the United States, in violation of 18 U.S.C. Section 371; evasion of the personal income taxes of REUBEN STURMAN

> for the year of 1979, in violation of Title 26, U.S.C. Section 7201; and the subscribing under penalities [sic] of perjury and filing by REUBEN STURMAN of a false individual income tax return for 1979, in violation of Title 26, U.S.C. Section 7206(1), as alleged in Counts I, III, and VIII of this Indictment, hereby incorporated by reference herein.
>
> In violation of Title 31, U.S.C., Section 1059 (recodified as Title 31, U.S.C., Section 5322, effective September 13, 1982).

The allegations of Paragraph Four above, asserting that the substantive offense charged was in furtherance of a conspiracy to violate other provisions of federal law, are germane to an enhancement provision of the penalty statute, 31 U.S.C. § 5322(b). Counts Thirteen, Fourteen and Fifteen differ from Count Twelve only in regard to the years involved (Count XIII, 1980; Count XIV, 1981; Count XV, 1982) and to corresponding counts ranging from IV through XI incorporated for purposes of the enhancement allegation.

Paragraph Ninety-Nine on page forty, which is a part of the general conspiracy charge asserted in Count One, alleged that individual income tax returns specified therein "did not include information required by law concerning interest [sic] and/or signatory authority over a bank, securities or other financial account in a foreign country", the same subject matter addressed in Counts Twelve through Fifteen.

In addition to the foregoing, Counts Thirteen and Fourteen charge further violations for the years 1980 and 1981. The pertinent allegations therein are:

> 4. That during the year [1980/1981], REUBEN STURMAN had or caused transactions involving the payments, receipt, and transfer of currency and other monetary instruments in excess of $10,000 involving domestic financial institutions.
>
> 5. That REUBEN STURMAN conducted or caused to be conducted, the transactions in

> paragraph 4 of this count in such a manner as to cause domestic financial institutions not to file reports required pursuant to Title 31, U.S.C., Section 1081 (recodified as Title 31, U.S.C., Section 5313).

Paragraph Seven on page eighteen, also a part of the conspiracy count, alleges that defendant Reuben Sturman, among others, failed to file "[c]urrency transaction reports and other financial transaction reports required by the laws of the United States" and that "transactions were conducted in a manner that caused domestic financial institutions not to file reports required by law."

Count Sixteen, the final count of the indictment, charges Reuben Sturman with obstruction of justice, in violation of 18 U.S.C. §§ 1503 and 2.

With regard to Count Sixteen, while the parties' briefs address a number of considerations, ultimately "the government agrees with Sturman that Count XVI must be dismissed without prejudice because that Count, through inadvertance [sic] of the drafter fails to allege that the defendant acted 'corruptly'. Sturman correctly states that 'corrupt' conduct is an essential element of an offense arising under Title 18, United States Code, Section 1503." Government's brief, p. 7. With such concession, it is clear that Count Sixteen should be dismissed.

Turning to the broadest of defendant's challenges to the indictment, he contends that each of Counts Twelve through Fifteen and the allied allegations of Paragraphs Seven and Ninety-Nine of Count One are subject to dismissal for the reason that the reporting requirements of the Bank Secrecy Act, 31 U.S.C. § 5311 *et seq.*, which he is alleged to have violated conflict with the Self-Incrimination Clause of the Fifth Amendment,[2] a question left undecided by the Supreme

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[2] Although the motion seeks blanket dismissal of the counts in question it is clear that if defendant's Fifth Amendment arguments were accepted Counts Thirteen and Fourteen would not be subject to dismissal, in that they in part allege unlawful conduct under provisions of the law not challenged upon Fifth Amendment grounds.

Court in its consideration of that legislation in *California Bankers Assn. v. Shultz*, 416 U.S. 21 (1974).

Title II of the Bank Secrecy Act, also known as the Currency and Foreign Transactions Reporting Act, contains the reporting requirements at issue herein. The Act provides that:

> (a) The Secretary of the Treasury . . . shall by regulation require any resident or citizen of the United States, or person in the United States and doing business therein, who engages in any transaction or maintains any relationship, directly or indirectly, on behalf of himself or another, with a foreign financial agency to maintain records or to file reports, or both, setting forth such of the following information, in such form and in such detail as the Secretary may require:
>
> 1. The identities and addresses of the parties to the transaction or relationship.
> 2. The legal capacities in which the parties to the transaction or relationship are acting, and the identities of the real parties in interest if one or more of the parties are not acting solely as principals.
> 3. A description of the transaction or relationship, including the amounts of money, credit, or other property involved.

31 U.S.C. § 5314.

The regulations adopted pursuant to the Bank Secrecy Act are set out in Part 103 of 31 Code of Federal Regulations. 31 C.F.R. § 103.24 provides that:

> Each person subject to the jurisdiction of the United States (except a foreign subsidiary of a U.S. person) having a financial interest in, or signature or other authority over, a bank, securities or other financial account in a foreign country shall report such relationship to the Secretary for each year in which such relationship exists, and shall provide such information as shall be specified in a reporting form

> prescribed by the Secretary to be filed by such persons. Persons having a financial interest in 25 or more foreign financial accounts need only note that fact on the form. Such persons will be required to provide detailed information concerning each account when so requested by the Secretary or his delegate.

Record-keeping requirements regarding foreign accounts included in the scope of 31 C.F.R. § 103.24 are provided for at 31 C.F.R. § 103.32.

The constitutionality of the Bank Secrecy Act was challenged in *California Bankers, supra*, by a banking association, a bank and several depositors who asserted that they were subject to the reporting requirements of the Act. The court held that the foreign transaction reporting requirements did not deprive the plaintiffs of due process or violate the Fourth Amendment. A challenge by the depositors to the Act on the ground that it violated the Self-Incrimination Clause of the Fifth Amendment, however, was deemed "premature", as the plaintiffs made "no allegation that any of the information required by the Secretary will tend to incriminate them." *Id.* at 73.

As Sturman contends that the information required by the Secretary would tend to incriminate him, the constitutional issue reserved in *California Bankers* is appropriately before the court.

In support of his position that the Act contravenes the Fifth Amendment Sturman cites to a series of decisions of the Supreme Court dealing with the constitutionality of other self-reporting statutes. Each of those cases has been the subject of analysis by the Sixth Circuit in the recent case of *United States v. Alkhafaji*, 754 F.2d 641 (6th Cir. 1985).[3]

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[3] Much to this Court's surprise, *Alkhafaji* has been cited by neither Sturman nor the Government. Nevertheless, that decision squarely addresses the arguments raised by Sturman and considered most of the authorities discussed in the parties' briefs.

Alkhafaji was convicted under the Gun Control Act of 1968, 18 U.S.C. § 922(e), for delivering firearms to an airline for transportation without written notice to the carrier. He contended that such reporting requirements violated his Fifth Amendment privilege against self-incrimination. In addressing that contention Chief Judge Lively, writing for the majority, observed that the Supreme Court had considered the Fifth Amendment implications of self-reporting statutes in a variety of contexts, and applying those precedents, to be discussed hereinafter, upheld the conviction.

The first of those cases is *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965), in which it was held that the provisions of the Subversive Activities Control Act of 1950, which required members of the Communist Party to register with the Attorney General, violated the privilege against compelled self-incrimination, since admission of party membership could be used to prosecute the registrant under the Smith Act, which made illegal membership in any organization which advocated the overthrow of the government by force or violence. In concluding that the statute violated the Fifth Amendment, the Supreme Court contrasted its registration requirements with the requirement to file income tax returns, which had been upheld in *United States v. Sullivan*, 274 U.S. 259 (1927). The *Albertson* court noted:

> In *Sullivan* the questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a highly selective group inherently suspect of criminal activities. Petitioners' claims are not asserted in an essentially noncriminal and regulatory area of inquiry but against an inquiry in an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of the crime.

382 U.S. at 79.

The next significant line of Supreme Court rulings considered was issued in 1968 in three decisions authored by

Justice Harlan, in which the Court applied the *Albertson* criteria in striking down various self-disclosure statutes.

In *Marchetti v. United States*, 390 U.S. 39 (1968), the Court held unconstitutional a statute making it a crime to willfully fail to pay an occupational tax on gambling and to register as a gambler. Numerous state and federal laws made wagering a crime, and the Court found that the information obtained from the federally mandated registration would be readily available to prosecutors enforcing those laws. The constitutional infirmity found was that such information, provided on pain of criminal prosecution, "would surely prove a significant 'link in a chain' of evidence tending to establish his guilt," with the "direct and unmistakable consequence of incriminating" the registrant. *Id.* at 48-49.

Similarly, in *Grosso v. United States*, 390 U.S. 62 (1968) the Court applied the *Albertson* criteria to strike down a statute mandating the duty of gamblers to file monthly returns with the Internal Revenue Service on a form which revealed the details of the wagering. As in *Marchetti*, the Court found that the combination of federal and state anti-gambling laws placed Grosso "entirely within 'an area permeated with criminal statutes' where he is 'inherently suspect of criminal activities'." *Id.* at 64.

In *Haynes v. United States*, 390 U.S. 85 (1968), the Court overturned a conviction for failing to register a sawed-off shotgun for purposes of taxation. The Court found that the statute was intended to require taxation only of weapons used principally by persons engaging in illegal activities. Further, the registration requirement was part of a law which made possession and transportation of certain firearms illegal under many circumstances. It too was found to exist as part of an "area permeated with criminal statutes", rather than an area concerned primarily with governmental regulation in a non-criminal setting.

The gist of the foregoing holdings was well stated in *United States v. Scherer*, 523 F.2d 371, 375 (7th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976) as:

> The objectionable feature of the statutes found in *Marchetti* and the related cases of *Grosso* and

> *Haynes* was that the act of registration itself constituted an *ipso facto* confession of criminality.[4]

That view is confirmed by a reading of the opinion in *Leary v. United States*, 395 U.S. 6 (1969), in which the Supreme Court reversed a conviction under the Marijuana Tax Act. Central to the Court's finding of a Fifth Amendment violation in that case was a detrmination [sic] that the purpose of the statute was to bring to light violations of the marijuana laws. Since possession of marijuana is illegal in every state, compliance with the act would create a "real and appreciable" risk of incrimination. *Id.* at 18.

The final pronouncement of the Supreme Court analyzed in *Alkhafaji* was *California v. Byers*, 402 U.S. 424 (1971), which upheld a requirement that motorists involved in an automobile accident must stop at the scene and identify themselves. In an opinion authored by Chief Justice Burger, a plurality of the court observed that the California statute in question "identifies but does not by itself implicate anyone in criminal conduct". *Id.* at 434. The Chief Justice noted that:

> [i]nformation revealed by these reports could well be 'a link in the chain' of evidence leading to prosecution and conviction. But under our holdings the mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure called for by statutes like the one challenged herein.

Id. at 428. In concluding that the statute did not violate the privilege against self-incrimination the Chief Justice wrote that:

> [a]lthough identity, when made known, may lead to inquiry that in turn leads to arrest and charge, those developments depend on different factors and independent evidence.

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[4] In his concurring opinion in *Alkhafaji* Judge Krupansky similarly noted that the common thread in *Marchetti*, *Grosso* and *Haynes* was that "it was essential to the conclusion of unconstitutionality that the compelled testimony amounted to a virtual admission of criminal activity". *U.S. v. Alkhafaji*, *supra*, at 649.

Id. at 434. Thus, because the disclosure required of the motorists did not inevitably lead to prosecution and conviction, it was found not to "entail the substantial risk of self-incrimination", *id.* at 431, involved in *Albertson* and its progeny.

Justice Harlan, the author of *Marchetti*, *Grosso* and *Haynes*, concurred in the result in *Byers*. He observed that the driver's assertion that he would incriminate himself by complying with the statute was "plausible", but stated that "the presence of a 'real' and not 'imaginary' *risk* of self-incrimination is not a sufficient predicate for extending the privilege" to encompass the California statute. *Id.* at 439 (emphasis added). He observed that in each of the *Marchetti – Grosso – Haynes – Leary* line of cases the statute required "the individual to focus attention directly on behavior which was *immediately recognizable as criminal* in virtually every State in the Union." *Id.* at 453 (emphasis added). Justice Harlan found significance in the fact that:

> Byers having once focused attention on himself as an accident participant, the State must still bear the burden of making the main evidentiary case against [him]. To characterize this burden as a merely ritualistic confirmation of the conviction secured through compliance with the reporting requirement in issue would be a gross distortion of reality; on the other hand, that characterization of the evidentiary burden on the State and Federal Governments after compliance with the regulatory scheme in *Marchetti* and *Grosso* seems proper.
>
> Considering the noncriminal governmental purpose in securing the information, the necessity for self-reporting as a means of securing the information, and the nature of the disclosures involved, I cannot say that the purposes of the Fifth Amendment warrant imposition of a use restriction as a condition on the enforcement of this statute.

Id. at 457-58.

Based upon an analysis of each of the *Sullivan*, *Albertson*, *Marchetti*, *Grosso*, *Haynes* and *Byers* opinions the majority in

Alkhafaji concluded that the statute under which the defendant was charged:

> . . . falls somewhere between the statutes considered in the *Albertson* line and the one at issue in *Byers*. Though it is primarily a regulatory statute, it does reflect congressional concern with weapons and ammunition, an area permeated with criminal statutes. However, all persons who ship firearms or ammunition to someone other than a licensed importer, dealer, manufacturer or collector are required to give written notice to the carrier. . . . Many people who would fall into this group would not be acting unlawfully. It cannot be said that this requirement is directed at a "highly selective and inherently suspect" group of people.

United States v. Alkhafaji, supra, at 647. The *Alkhafaji* court concluded that, under these circumstances, the reporting requirement was not inconsistent with the Fifth Amendment privilege against self-incrimination.

Judge Krupansky entered a separate opinion in *Alkhafaji*, concurring in the result but advancing a somewhat different analysis of the Supreme Court's decisions in the Fifth Amendment area than that contained in the majority opinion, including the observation that:

> Unfortunately, neither Justice Harlan nor the Chief Justice sufficiently resolved the [Fifth Amendment] dilemma by synthesis of the *Sullivan*, *Albertson*, *Marchetti*, *Grosso*, *Haynes* and *Byers* opinions. As a result, the appeals and district courts continue to fumble with possible solutions. Somewhat expediently, they have narrowed the inquiry to Justice Harlan's summary of his extended discussion which listed three elements, (1) governmental purpose, (2) the essential nature of the self-reporting mechanism, and (3) the nature of the disclosures, as the salient factors compelling his decisions.

Id. at 655-56. Judge Krupansky was of the opinion "this approach, however, presents serious infirmities" as it does not provide "a unified analysis which can satisfactorily account

for the diverse principles which may arise in cases charging fifth amendment challenges to statutory self-reporting requirements". *Ibid.* He identified the following broad framework as that which he believed derived from the Supreme Court's decisions in this area:

> If the [required] admission appears incriminatory on its face, for example, by directing disclosure of personal criminal conduct or contemplated criminal conduct, by significantly enhancing the likelihood of prosecution, or by providing direct evidence which will facilitate a conviction, then the fifth amendment issue is resolved: the compelled disclosure is unconstitutional. In such instances the fifth amendment's protection is absolute.
>
> However, as the "directness" of the admission of criminal enterprise diminishes, the more obscure the applicability of the fifth amendment becomes. Thus, a more precise evaluation of the relevant elements is necessary to equate the constitutional right to silence against the government's demand for disclosure.

Id. at 656-57. He maintained that a three-part investigation resulting from a colligation of the *Sullivan*, *Albertson*, and *Byers* cases should be used to perform this "more precise evaluation":

> First, the statutory scheme itself must be examined. This requires identification of various interests and policies advanced by the enactment. Together with those elements (which, it goes without saying, must represent legitimate governmental objectives), the court must evaluate the effectiveness and importance of the self-reporting requirements *vis-a-vis* those interests and policies. The cases reflect two objectives of this review: (a) it is necessary to determine if self-disclosure is at all necessary to the statutory scheme and, if it is, to what degree; (b) to assist resolution of the issue as to when and how the fifth amendment claim should be raised. Generally, if the statutes represent legitimate governmental

objectives to which self-reporting is essential, then the declarant would be permitted to submit specific fifth amendment claims to some tribunal (usually the agency charged to collect the forms).

Second, the court is charged with the responsibility to evaluate the nature of the disclosure which is compelled. Two aspects of the required registration are here relevant: (a) the identity of those required to register; (b) the area of application, that is, the class of conduct which raises the spectre of the statute. The thrust of the inquiry is to determine if the filing requirements are imposed upon the public at large or upon a select group generally associated with criminal conduct. If the latter, unconstitutionality is suspect. Similarly, in (b) above the inquiry endeavors to determine if the registration is required in an area essentially regulatory and not generally criminalized, or in an area permeated with criminal prosecution. The more "regulatory" the inquisition the stronger the government's case for upholding the constitutionality of the statute.

The third inquiry charges the court to integrate its initial findings and determine if compliance with the statute may involve the suspect individuals in the admission of the crucial element of a crime. To accomplish this task, the court must consider the facially neutral questions in context. *Byers* and *Sullivan* are excellent applications of the foregoing analysis. In context, the identification required of the California driver, while promising to make him the focus of the investigation, was essentially neutral in the criminal law sense.

Id. at 657-58.

Applying this test to the statute at issue in *Alkhafaji*, Judge Krupansky distinguished between the "doubtful propriety" of the written notice requirement of the statute in question and its "disclosure and surrender control" provision,

concluding that the latter proviso passed constitutional muster.[5] He observed that:

> [i]n appropriate parlance, the written-notice clause is a criminalized statute by design and effect, while the passenger requirement is essentially regulatory and neutral in purpose and result.
>
> Further, the "disclosure and surrender control" provision being fully applicable to every passenger regardless of criminal backgrounds, insulates that statute from the charge that it is narrowly directed at an inherently suspect criminal group. There is no "focus on behavior immediately recognizable as criminal", those who comply run no greater risk of reducing "the 'accusatorial system' to the role of a merely ritualistic confirmation of the 'conviction' secured through the" admission than did the *Byers* driver.

id. at 661, and noted that the "disclosure and delivery of custody *simpliciter* does not equal the admission of a crime, nor does it, by itself, 'significantly enhance the likelihood of prosecution'." *Ibid.*

Both the majority opinion and the concurrence of Judge Krupansky in *Alkhafaji* constrain this Court to conclude that the Bank Secrecy Act does not violate the Fifth Amendment.

Although the Bank Secrecy Act is arguably less "regulatory" than the statute in *Alkhafaji*, the crucial factor identified by the majority in *Alkhafaji* was that the conduct to be reported, the shipment of firearms, was not itself illegal. Similarly, there is nothing illegal *per se* about the ownership of an interest in a foreign bank account, and the reporting of such an interest does not, standing alone, implicate admission

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[5] 18 U.S.C. § 922(e) contains two provisos, one requiring the giving of written notice of transportation of weapons and the other requiring surrender of the weapon to the carrier for the duration of the trip. Although it might appear from the majority opinion that Alkhafaji was only charged under the first proviso, Judge Krupansky's concurrence would indicate that the defendant was alleged to have violated both provisos. The indictment itself is not set out in either opinion.

of the commission of a crime. Consequently, under the rationale of the majority in *Alkhafaji* the reporting requirements of the Bank Secrecy Act would not be considered as violating the Fifth Amendment's privilege against self-incrimination, as they do not compel a disclosure of acts directly linking the individual to unlawful conduct.

This conclusion is also compelled by the use of Judge Krupansky's three-part analysis.

The first stage of that analysis calls for the court to examine the statutory scheme of the Currency and Foreign Transactions Reporting Act. An avowed purpose of the Act "is to furnish American law enforcement authorities with the tools necessary to cope with the problems created by so called secrecy jurisdictions". H.R. Rep. No. 975, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Adm. News 4394, 4404. One of the major problems thus alluded to is the use of secret accounts in foreign countries to hide the fruits of unlawful activities. It would appear from the legislative history of the Act that one of its anticipated benefits would be identification of individuals whose activities could be the subject of criminal investigation. On the other hand, the area in which the Act is operative, the banking industry, is one that is highly regulated by various arms of government, both Federal and State, and it is questionable whether it would be considered as "permeated with criminal statutes". It certainly does not operate in an area as criminalized as those found to be impermissible in the rulings of the Supreme Court previously discussed. Clearly, the self-reporting requirement of the Act is necessary to effect its purposes, both regulatory and potentially investigatory.

The second inquiry called for under Judge Krupansky's test is to determine the nature of disclosure compelled. The identity of those required to report under the statute is all members of the public having an interest in a foreign financial account, as specified by the regulations. Consequently, the conduct which triggers the operation of the regulation, although perhaps somewhat suspicious, is by no means *per se* illicit or "immediately recognizable as criminal".

Finally, the third prong charges the court to determine if compliance with the statute involves "the admission of the crucial element of a crime". The short answer to this inquiry is no. Just as the reporting requirement in *Byers* might focus prosecutorial attention on a driver involved in an accident, the mere ownership of an interest in a foreign financial account would only focus the government's attention upon the taxpayer. The government must go a long way beyond that to prove the elements of any crime, including charges of tax evasion or conspiracy as alleged herein. Accordingly, it cannot be said that the admissions called for under the regulations would reduce the "accusatorial system to the role of a merely ritualistic confirmation of the 'conviction' secured through the admission."

Thus, use of the somewhat narrower test enunciated by Judge Krupansky would result in a finding of constitutionality of the statutory scheme.

The conclusion that the reporting requirements at issue are constitutional is consistent with the views of other courts which have considered Fifth Amendment attacks against different provisions of the Bank Secrecy Act.

Two Circuit Courts of Appeals have dealt with Fifth Amendment challenges to the Act's requirement that travelers report the transportation of more than Five Thousand Dollars ($5,000.00) in monetary instruments across United States borders.

In *United States v. Dichne*, 612 F.2d 632 (2nd Cir. 1979), the defendant carried Four Hundred Fifty Thousand Dollars ($450,000.00) out of the country for deposit to a Swiss bank account, and did not report that fact to the Customs Service as required by the Bank Secrecy Act. In upholding the reporting requirement, the *Dichne* court noted that the statute applied to all travelers and therefore could not be construed as aimed at an "inherently suspect group". *Id.* at 640. The court observed that there is nothing illegal about transporting large sums of currency out of the country, by reason of which the required disclosure would provide no direct link to criminal activity, and concluded that the statute, therefore, did not violate the self-incrimination clause.

In *United States v. Des Jardins*, 747 F.2d 499 (9th Cir. 1984), *partly vacated on different grounds*, 772 F.2d 578 (1985) the defendant was convicted of violating the same currency transportation reporting requirement. In analyzing the scope of that requirement the *Des Jardins* court stated that the requirement is:

> directed at all persons travelling across the border with more than $5,000.00 in monetary instruments. Since the transportation of monetary instruments in such amounts is not itself illegal and since there is no reason to suppose that the transportation of monetary instruments in such amounts is generally connected with criminal activity, the vast majority of people subject to the requirement are not suspect of illegality. This is in sharp contrast to the groups subject to every reporting requirement struck down by the Supreme Court.

Id. at 509 (citing *Leary*, *Marchetti* and *Albertson*). The *Des Jardins* court went on to conclude that under these circumstances the statute did not run afoul of the self-incrimination clause. *See also*, *United States v. Russell*, 622 F.Supp. 940 (S.D. Fla. 1985); *United States v. Sanchez-Vasquez*, 585 F.Supp. 990 (N.D. Ga. 1984); *United States v. San Juan*, 405 F.Supp. 686 (D.Vt. 1975), *rev'd on other grounds*, 545 F.2d 314 (2d Cir. 1976).

The reasoning of the *Dichne* and *Des Jardins* courts is applicable to the provisions of the Bank Secrecy Act attacked here. Just as it is not illegal to transport currency out of the country, the possession of a foreign bank account is not *per se* illegal, and the foreign bank account reporting provisions apply to a wide range of citizens and not to a specific group engaged in activities declared unlawful under other statutes. Thus, the Currency and Foreign Transactions Reporting Act does not unconstitutionally infringe the Fifth Amendment privilege against self-incrimination.[6]

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[6] In light of this conclusion, the court need not address the government's contention that Sturman has not timely exercised his Fifth Amendment rights.

It is, therefore, recommended that the defendant's motion to dismiss based upon Fifth Amendment considerations be denied.

The defendant's next broad based challenge to the indictment is based upon the contention that it fails to state the offenses charged with sufficient particularity to pass constitutional muster. Before addressing the specifics of such challenge it is appropriate to consider the broad Sixth Amendment principles applicable thereto.

Both the government and the defendant appear to recognize *Russell v. United States*, 369 U.S. 749 (1962), as a primary authority on the issue of the requisites of an indictment. In *Russell* the defendants were convicted of violating 2 U.S.C. § 192 in refusing to answer certain questions when called to testify before a congressional subcommittee. The indictments alleged, tracking the language of the statute, that the questions which the defendants refused to answer "were pertinent to the question then under inquiry", but did not specify what that "question then under inquiry" was. The Supreme Court set aside the convictions, holding that the indictments were constitutionally deficient. In so doing the court set out the following principles applicable to the sufficiency of indictments generally vis-a-vis the command of the Sixth Amendment that "In all criminal prosecutions the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation.":

> In a number of cases the Court has emphasized two of the protections which an indictment is intended to guarantee, reflected by two of the criteria by which the sufficiency of an indictment is to be measured. These criteria are, first, whether the indictment "contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet,' " and secondly, " 'in case any other proceedings are taken against him for a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction'." [Citations omitted.]

* * *

As has been pointed out, the very core of criminality under 2 U.S.C. § 192 is pertinency to the subject under inquiry of the questions which the defendant refused to answer. What the subject actually was, therefore, is central to every prosecution under the statute. Where guilt depends so crucially upon such a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute.

"It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species, – it must descend to particulars.' " *United States v. Cruikshank*, 92 U.S. 542, 558. An indictment not framed to apprise the defendant "with reasonable certainty, of the nature of the accusation against him . . . is defective, although it may follow the language of the statute." *United States v. Simmons*, 96 U.S. 360, 362. "In an indictment upon a statute, it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished; . . . " *United States v. Carll*, 105 U.S. 611, 612. "Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged." [Citations omitted.]

* * *

> A cryptic form of indictment in cases of this kind requires the defendant to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture.
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> It is argued that any deficiency in the indictments in these cases could have been cured by bills of particulars.
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> But it is a settled rule that a bill of particulars cannot save an invalid indictment. [Citations omitted.] When Congress provided that no one could be prosecuted under 2 U.S.C. § 192 except upon an indictment, Congress made the basic decision that only a grand jury could determine whether a person should be held to answer in a criminal trial for refusing to give testimony pertinent to a question under congressional committee inquiry. A grand jury, in order to make that ultimate determination, must necessarily determine what the question under inquiry was. To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.

Id., at pp. 763-770.

An excellent extrapolation of the rules established by *Russell* is found in *United States v. Cecil*, 608 F.2d 1294 (9th Cir. 1979), in which convictions were reversed for the reason

that an indictment "which track[ed] the language of the pertinent statutes in setting out the elements of the offenses with which the defendants were charged . . . fail[ed] to allege sufficient facts to facilitate the proper preparation of a defense and to ensure that the defendants were prosecuted on facts presented to the Grand Jury". *Id.* at 1296-1297. In the course of that opinion the court stated:

> We begin our analysis stating the established rule that a bill of particulars cannot save an invalid indictment. *Russell v. United States*, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962); *United States v. Keith*, 605 F.2d 462, 464 (9th Cir. 1979); *United States v. v. Nance*, 174 U.S.App.D.C. 472, 474, 533 F.2d 699, 701 (D.C. Cir. 1976). The very purpose of the requirement that a man be indicted by a grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. *Russell v. United States*, 369 U.S. at 771, 82 S.Ct. 1038 (citing *Stirone v. United States*, 361 U.S. 212, 218, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960)). If a bill of particulars were allowed to save an insufficient indictment, the role of the grand jury as intervenor would be circumvented. Rather than the assurance that a body of fellow citizens had assessed the facts and determined that an individual should face prosecution, the prosecutor would be in a position to second guess what actually happened with the grand jury and fill in the gaps with what he assumed transpired The protection of a significant check on the power of the courts and prosecutors would thus be lost. For similar reasons, 'open file' discovery cannot cure an invalid indictment. Thus, the trial judge's stated reasons for denying the motion to dismiss were in error, and we must now determine the validity of this indictment.

This inquiry must focus upon whether the indictment provides "the substantial safeguards" to criminal defendants that indictments are designed to guarantee. *Russell v. United States*, 369 U.S. at 763, 82 S.Ct. 1038. Pursuant to this purpose, an indictment must furnish the defendant with a sufficient description of the charges against him to enable him to prepare his defense, to ensure that the defendant is prosecuted on the basis of facts presented to the grand jury, to enable him to plead jeopardy against a later prosecution, and to inform the court of the facts alleged so that it can determine the sufficiency of the charge. *Russell v. United States*, 369 U.S. at 763, 768 n. 15, 771, 82 S.Ct. 1038; *United States v. Keith*, 605 F.2d at 464; *United States v. Pheaster*, 544 F.2d 353, 360 (9th Cir. 1976), *cert. denied*, 429 U.S. 1099, 97 S.Ct. 1118, 51 L.Ed.2d 546 (1977). To perform these functions, the indictment must set forth the elements of the offense charged and contain a statement of the facts and circumstances that will inform the accused of the specific offense with which he is charged. *Hamling v. United States*, 418 U.S. 87, 117-18, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974).

* * *

[We] find that the indictment fails to allege sufficient facts to facilitate the proper preparation of a defense and to ensure that the defendants were prosecuted on facts presented to the Grand Jury. This indictment clearly lacked a statement of the facts and circumstances that would inform the accused of the specific offenses with which they were charged. *See Hamling v. United States*, 418 U.S. at 117-18, 94 S.Ct. 2887. In addition, the insufficiency of this indictment raises a problem described recently by another panel of this Court:

> To allow a prosecutor or court to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection that the grand jury was designed to secure, because a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury that indicted him. [Cites omitted.]

United States v. Keith, 605 F.2d at 464; *see also United States v. Nance*, 533 F.2d at 701. The glaring lack of factual particularity of this indictment thus runs afoul of two key functions of indictments.

We view this decision as consistent with the case law in this area. Our decision is predicated upon the absence of any factual particularity within the indictment. Although indictments have been upheld that are not factually precise, *see, e.g., Wong Tai v. United States*, 273 U.S. 77, 81, 47 S.Ct. 300, 71 L.Ed. 545 (1927); *United States v. Giese*, 597 F.2d at 1170, 1178 (9th Cir. 1979); *United States v. Pheaster*, 544 F.2d at 360, a perusal of all of these cases indicates that the indictments in question contained more extensive factual allegations than found here. Similarly, the fact that an indictment may have tracked the language of the statute will not render it valid if it fails to allege an essential element of the offense or the minimum facts required to fulfill the purposes of indictments. *Cf. United States v. Keith*, 605 F.2d 464; *United States v. Curtis*, 506 F.2d 985, 990 (10th Cir. 1974) (holding that the indictment's failure to identify with any particularity the nature of the alleged scheme to defraud rendered the indictment fatally defective). *Id.*, at 1296-1297.

Based upon such principles, it has been held that an indictment which charges an offense under a statute or regulations containing multiple provisions without specifying which

provision was allegedly violated or alleging factual particulars which would permit a reasoned determination to be made as to the discrete offense intended to be charge by the grand jury is invalid. *Van Liew v. United States*, 321 F.2d 664 (5th Cir. 1963); *United States v. Heinze*, 361 F.Supp. 46 (D. Del. 1973).

Although the defendant attacks the sufficiency of Counts Seven through Fifteen on multiple grounds, there are two arguments advanced against all of them. Each count contains allegations pertaining to "a foreign bank, securities or financial account in a foreign country" (Counts Seven, Eight, Nine, Ten and Eleven) or dealings with a "foreign financial institution" (Counts Twelve, Thirteen, Fourteen and Fifteen), without any further identifications. The defendant contends that this failure to name the foreign institution renders the counts fatally deficient. Allied to that position is the argument that such vice is compounded by the fact that the operative statute, 31 U.S.C. §5312(a)(2), formerly 31 U.S.C. §1052(e), defines the term "financial institution" as including nineteen specific categories of businesses plus two catchalls covering a "Federal, State or local government institution which performs any of the functions of any of the businesses listed above; or any other type of business or institution performing similar, related or substitute functions specified by the Secretary by regulation for the purpose of the provision of this chapter to which the regulation relates."[7]

In this Court's opinion the defendant's contentions in such regards are sound.

The world is full of foreign financial institutions, both traditional banking enterprises and others covered by the broader definition of the statute involved. As this indictment stands, the defendant is not informed as to the financial institution or institutions with which the grand jury believed

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[7] Although this contention is presented under an argument headed "Counts 12-15 Of The Indictment Are Defective In That Each Is Drawn In The Alternative", this Court believes that it is appropriately considered in conjunction with the primary argument that the counts are deficient for failure to give adequate notice of the offense charged.

he dealt. There is no way of knowing whether the same institution, or a different one, is involved in the various counts and/or whether a single or multiple institutions are involved.

Consequently, each of the vices enumerated in *United States v. Cecil, supra*, exists in this case. The description of the charges is insufficient for preparation of a defense. It could not be determined whether the trial evidence was the same as that upon which the grand jury returned the indictment. The indictment is not such that a plea of double jeopardy could be maintained as against a subsequent indictment referring to an identified foreign financial institution or accounts.

Although the counts in question track the statutory language, this is an instance in which a statement of "the minimum facts required to fulfill the purposes of the indictment", *id.* at 1297, is required in order to meet the mandate of the Sixth Amendment as defined by the Supreme Court in *Russell, supra*.[8]

The government argues that the failure to identify the institution of institutions and the account or accounts upon which these counts of the indictment are based is cured by fact that Counts Twelve through Fifteen each incorporates by reference Count One, in which the missing factual allegations may be found.[9] This Court is unable to accept that contention.

Without addressing defendant's argument that such incorporation is aimed solely at identifying an underlying offense for purposes of penalty enhancement and may not be read as incorporation for substantive purposes, a position that on its face has considerable merit, Count One is of such scope and refers to so many foreign financial institutions and transactions that neither the defendant nor the court should be put to

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[8] If the deficiency created by the failure to specify the financial institutions and /or accounts was cured by the naming of a specific institution or institutions the alternative argument based upon the multiple definitions of a financial institution set out in the relevant statute would be mooted.

[9] Assuming that this was so, it would not effect the sufficiency of Counts Seven through Eleven.

the task of attempting to ascertain which of the multitudinous transactions is responsive to the counts in question. Even if such a burdensome task was to be undertaken there could be no assurance that the conclusions reached would accurately reflect the determinations made by the grand jury.[10]

There is a further flaw in Counts Seven through Eleven. Each charges the defendant with knowingly filing a false tax return in that "said return did nor accurately report *either* his gross income *or* interest in, *or* signature authority over a foreign bank, securities or financial account in a foreign country" (emphasis added). With such disjunctive allegation it cannot be said whether the defendant is charged with either or all of knowingly misstating his total gross income, or gross income from a foreign financial account, or dealings in a foreign country. That being so, the charge is constitutionally deficient. *See, United States v. Lemire*, 720 F.2d 1327 (D.C. Cir. 1983) *cert. denied*, 467 U.S. 1225 (1984); *United States v. Bean*, 564 F.2d 700 (5th Cir. 1977); *United States v. Donovan*, 339 F.2d 404 (7th Cir. 1964) *cert. denied*, 380 U.S. 975 (1965); *United States v. Heinze, supra.*

Based upon the foregoing, it follows that an order dismissing Counts Seven through Fifteen, without prejudice, is in order.

As Your Honor may not accept the recommendation for dismissal on this ground,[11] the defendant's further contentions

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[10] There is also a veiled suggestion in the government's brief that the defendant knows perfectly well what is at issue, and that this defense is a mere technicality. The simple answer to this is that if a bill of particulars cannot save a deficient indictment, certainly a defendant's assumed state of knowledge cannot do so.

[11] Although this Court does not perceive this issue as a close question, Your Honor certainly could see it otherwise. It is, however, observed that requiring the government to proceed on a "clean" indictment would obviate the possibility of having to try the case twice, as could occur if it went forward on the present indictment and, if a conviction was obtained, it was held on appeal that the indictment was insufficient.

seeking dismissal of certain counts of the indictment, or portions thereof, on more limited bases will also be considered.

The defendant has moved to dismiss "Those Portions of Counts 1, 13, and 14 Which Charge Violations of the Domestic Currency Statute, 31 U.S.C. §1081 (Recodified as 31 U.S.C. §5313)", contending that such fail to state an offense against him.

In its original version 31 U.S.C. §1801 [sic] read:

> Transactions involving any domestic financial institution shall be reported to the Secretary at such time, in such manner, and in such detail as the Secretary may require if they involve the payment, receipt, or transfer of United States currency, or such other monetary instruments as the Secretary may specify, in such amounts, denominations, or both, or under such circumstances, as the Secretary shall by regulation prescribed [sic].

When recodified as section 5313(a) in 1982 the statute was amended to provide:

> When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

That legislation is not self-executing and "the Act's civil and criminal penalties attach only upon violation of regulations promulgated by the Secretary; if the Secretary were to do nothing the Act itself would impose no penalties on anyone." *California Bankers Assoc. v. Schultz*, 416 U.S. 21, 26 (1974). The primary regulation promulgated thereunder, 31 C.F.R. §103.22(a), has been amended in certain particulars since initially issued in 1972, but in its various forms has always imposed the obligation of filing reports thereunder only upon the "financial institution" involved in financial transactions in excess of Ten Thousand Dollars ($10,000.00).

Although it does not directly appear from the face of the indictment, the parties are in apparent agreement that the underlying factual predicate for these counts presents the issue of whether an individual who "structures" financial transactions by engaging in multiple banking transactions of less than Ten Thousand Dollars ($10,000.00) each which in the aggregate amount to more than Ten Thousand Dollars ($10,000.00) can be held criminally liable under the Act and the regulations promulgated thereunder.

There is a clear division of authority on this issue. The First Circuit in *United States v. Anzalone*, 766 F.2d 676 (1st Cir. 1985), the Eighth Circuit in *United States v. Larson*, 796 F.2d 244 (8th Cir. 1986),[12] and the Ninth Circuit in *United States v. Dela Espriela*, 781 F.2d 1432 (9th Cir. 1986), and *United States v. Varbel*, 780 F.2d 758 (9th Cir. 1986), have each held that an individual engaging in a "structured" transaction has no criminal culpability. *See also, United States v. Cogswell*, 637 F.Supp. 295 (N.D. Ca. 1985). A contrary conclusion has been reached in the Second Circuit, *United States v. Heyman*, 794 F.2d 788 (2nd Cir. 1986), Fifth Circuit, *United States v. Thompson*, 603 F.2d 1200 (5th Cir. 1979), Tenth Circuit, *United States v. Cook*, 745 F.2d 1311 (10th Cir.

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[12] In *Larson* the court held that the specific issue under consideration had not been presented in *United States v. Massa*, 740 F.2d 629 (8th Cir. 1984), cited by the government as indicating that the Eight Circuit favored the imposition of liability arising from a structured transaction.

1984) *cert. denied*, ___ U.S. ___, 105 S.Ct. 1205 (1985) and three district courts, *United States v. Richter*, 610 F.Supp. 480 (N.D. Ill. 1985) *aff'd.*, 785 F.2d 312 (7th Cir. 1986) (table), *United States v. Sanchez-Vazquez*, 585 F.Supp. 990 (N.D. Ga. 1984) and *United States v. Konefal*, 566 F.Supp. 698 (N.D.N.Y. 1983). The Eleventh Circuit would also appear to be aligned with those holding in favor of culpability. *See, United States v. Giancola*, 783 F.2d 1549 (11th Cir. 1986); *United States v. Sans*, 731 F.2d 1521 (11th Cir. 1984); *United States v. Puerto*, 730 F.2d 627 (11th Cir. 1984) *cert. denied*, ___ U.S. ___, 105 S.Ct. 791 (1985); *United States v. Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983). *But see, United States v. Denenmark*, 779 F.2 1559 (11th Cir. 1986).

In this Court's opinion the better reasoned line of authority is that represented by *United States v. Anzalone, supra.* The rationale of that holding is compelling, and bears quotation in full:

> We next come to the "structured" transaction issue. We can find nothing on the face of either the Reporting Act, or its regulations, or in their legislative history, to support the proposition that a "structured" transaction by a customer constitutes an illegal evasion of any reporting duty of that customer.
>
> We need not go far to sustain this contention. The government itself has admitted to as much, though concededly through a branch other than the Justice Department. We refer to a report to Congress by the Comptroller General of the United States entitled, "Bank Secrecy Act Reporting Requirements Have Not Yet Met Expectations, Suggesting Need for Amendment," GED-81-80, dated July 23, 1981. The report discussed the deficiencies in the regulation on this issue, noting that "The regulations were silent on the propriety of a customer's conducting multiple transactions to avoid reporting." *Id.* at 23. Under the heading "Failure to prohibit splitting transactions allowed to circumvent reporting requirement," *id.* at 24, the report indicates:

> Similarly, although the regulation required reporting for each single transaction above $10,000, they did not specifically prohibit dividing a large transaction into several smaller transactions to circumvent the reporting requirement . . .

Under the title "Revision of regulations was not given a high priority," *id.* at 25, the report went on to say:

> Even though Treasury was aware of the flaws in the regulations in 1975, it did not publish, for comment, a proposal for needed revisions until September 1979; and Treasury did not implement revised regulations until July 7, 1980. Furthermore, despite the Secretary of the Treasury's commitment to a congressional committee in 1977 to revise the regulations, this was not done.

According to the report, although the July 1980 revisions to the regulations resolved some of the deficiencies, "the propriety of multiple transactions still has not been addressed in the regulations". *Id.* at 26.[13]

Although this court, like all other institutions of the United States, is supportive of the law enforcement goals of the government and society, we cannot engage in unprincipled interpretation of the law, lest we foment lawlessness instead of compliance. *Kolender v. Lawson*, 461 U.S. 352, 361, 103 S.Ct. 1855, 1869, 75 L.Ed.2d 903 (1983). This is particularly so when the confusion and uncertainty in this

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[13] Congress has now enacted Section 6050(I) of the Internal Revenue Code, 26 U.S.C. §6050(I) (West Dec. 1984), which places a reporting burden on any *person* who receives more than $10,000.00 in one or more related transactions. *See, United States v. Perlmutter*, 636 F.Supp. 219 (S.D.N.Y. 1986).

> law has been caused by the government itself, and when the solution to that situation, namely eliminating any perceived loop holes, lies completely within the government's control. If the government wishes to impose a duty on customers, or "other participants in the transaction," to report "structured" transactions, let it require so in plain language. It should not attempt to impose such a duty by implication, expecting that the courts will stretch statutory construction past the breaking point to accommodate the government's interpretation.
>
> We are required to conclude that the Reporting Act and its regulations, as they presently read, imposed *no duty* on appellant to inform the bank of the "structured" nature of the transactions here in question. The application of criminal sanctions to appellant for engaging in the activities heretofore described violates the fair warning requirements of the due process clause of the fifth amendment. The charges under Count V should be dismissed.

Id., at 681-682.

It is, therefore, recommended that Paragraphs Four and Five of Counts Thirteen and Fourteen be dismissed with prejudice.

With regard to Paragraph Seven on page eighteen of Count One, while it might be assumed that such allegation, which pertains to five other individuals as well as defendant Reuben Sturman, is correlative to the provisions of Counts Thirteen and Fourteen in question that is not so clear as to support an order striking that paragraph. Further, although such conduct may not be illegal *per se* the question of whether evidence of structured transactions may be offered as a part of the proofs under the conspiracy charged in Count One is not presented under the instant motion and remains an open one.

The final challenge to the indictment applies to Counts Twelve through Fifteen only, the defendant contending that those counts are defective in that they fail to state the official

or customary citation of the regulations he is alleged to have violated, as required by Rule 7(c)(1) of the Federal Rules of Criminal Procedure.

As previously noted, Counts Twelve through Fifteen involve provisions of the Bank Secrecy Act, 31 U.S.C. §§ 5313 and 5314, which require implementation through regulations in order to create any criminal culpability. It is argued by defendant that "the Secretary has exercised his authority by promulgating a wide variety of regulations covering a broad spectrum of factual scenarios", and that the failure of the indictment to specify which of the regulations is at issue leaves him unable to respond to Counts Twelve through Fifteen.

Counts Twelve through Fifteen charge the defendant with violating "Title 31, U.S.C., Section 1121 (recodified as Title 31, U.S.C. Section 5314) and the regulations promulgated thereunder" in failing to maintain records and file reports regarding his relationship and/or dealings with a foreign financial institution. Counts Thirteen and Fourteen, in addition, charge the defendant with violating "Title 31, U.S.C., Section 1081 (recodified as Title 31, U.S.C. Section 5313)" by reason of causing a financial institution not to file reports required thereunder.[14]

Dismissal of an indictment for error in omission of citation to the law alleged to be violated is proper only if the defendant is misled to his or her prejudice by reason of such deficiency. Rule 7(c)(3), *F.R.Cr.P.*; *See, United States v. Mayo*, 705 F.2d 62, 78 (2nd Cir. 1983). Such prejudice may be found if there are multiple statutory provisions or regulations which could apply and the indictment fails to inform the defendant which he or she is alleged to have violated. *See, United States v. Miller*, 774 F.2d 883 (8th Cir. 1985); *United States v. Heinze, supra*.

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[14] Although it has previously been recommended that such charges be dismissed on substantive grounds, for purposes of completeness of discussion they will be considered in conjunction with this issue.

The shortcoming in the defendant's position on this issue is that, while it is true that a number of regulations have been promulgated under the Bank Secrecy Act, he has failed to demonstrate that there are multiple regulations under sections 5313 and 5314 responsive to the factual allegations of the counts in question, and insofar as this Court has been able to determine such is not the case.

The regulations adopted under the Act appear at Part 103 of 31 C.F.R., headed "Financial Recordkeeping And Reporting Of Currency And Foreign Transactions". Subpart B thereof covers "Reports Required To Be Made" and Subpart C covers "Records Required To Be Kept". It would appear that the only regulations contained therein responsive to the allegations of the indictment regarding the defendant's alleged foreign dealings would be 31 C.F.R. § 103.24, requiring that "Reports of foreign financial accounts" be filed and 31 C.F.R. § 103.32, which requires "Records to be made and retained by persons having financial interests in foreign financial accounts" as to which the filing of reports is called for under § 103.24. By the same token, the only regulation of facial applicability to the defendant's alleged unlawful domestic financial dealings would appear to be 31 U.S.C. § 103.22 requiring "Reports of currency transactions".

Consequently, while it would be desirable for the indictment to state with particularity the regulations in question, *see, United States v. Gordon*, 641 F.2d 1281, 1284 (9th Cir.) *cert. denied*, 454 U.S. 859 (1981), the failure to do so has not been demonstrated by defendant as warranting dismissal of the allegations of the indictment at issue. *Cf., United States v. Garner*, 529 F.2d 962 (6th Cir. 1976).[15]

In summary, it is recommended that defendant's motion to dismiss based upon Fifth Amendment grounds be denied. It is further recommended: (1) based upon the government's concession of insufficiency, that Count Sixteen be dismissed;

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[15] If Your Honor was to order Counts Twelve through Fifteen dismissed without prejudice based upon the considerations previously discussed herein, it would be within Your Honor's discretion to direct that if those counts were renewed in a subsequent indictment they contain the appropriate citations.

(2) that Paragraphs Four and Five of Counts Thirteen and Fourteen be dismissed for failure to state an offense under the controlling statute's implementing regulation; (3) that Counts Seven through Fourteen be dismissed without prejudice by reason (a) of their failure to state sufficient facts to put the defendant on notice of the specific offense charged thereunder and (b) in addition, as to Counts Seven through Eleven by reason of pleading in the disjunctive.

/s/ David S. Perelman
DAVID S. PERELMAN
United States Magistrate

Dated: October 27, 1986

APPENDIX S

UNITED STATES DISTRICT COURT

Northern DISTRICT OF Ohio, Eastern Division

UNITED STATES OF AMERICA

V.

REUBEN STURMAN

JUDGMENT IN A CRIMINAL CASE

(Filed Feb. 15, 1990)

Case Number: CR85-133

J. Michael Murray
Attorney for Defendant

(Name and Address of Defendant)

THE DEFENDANT ENTERED A PLEA OF:

[__ guilty __ nolo contendere] as to count(s) ____, and

_x_ not guilty as to count(s) 1,2,3,4,5,6,7,8,9,10,11,12,13,14,15&16

THERE WAS A:

[__ finding _x_ verdict] of guilty as to count(s) 1,2,3,4,5,6,7,8,9,10,11,12,13,14,15&16

THERE WAS A:

[__ finding __ verdict] of not guilty as to count(s) ____

__ judgment of acquittal as to count(s) _____

The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF:

Ct. 1, 18:371, Conspiracy; Cts. 2-6, Income Tax Evasion, 26:7201; Cts. 7-11 Subscribing to False Return, 26:7206(1); Cts. 12-15, Foreign Bank Account & Currency Reporting, 31:1059 & 5322, and Ct. 16, Obstructing Justice, 18:1503.

IT IS THE JUDGMENT OF THIS COURT THAT: Defendant is committed to the custody of the Attorney General as follows: Ct. 1, 5 years; Cts. 2-4, 2 years as to each count; Cts. 5-6, 5 years; Cts. 12-15, 2 years as to each count; and Ct. 16, 5 years. The sentence imposed in Counts 5,6,12,13,14,15&16 shall run concurrently to each other and consecutively to the sentence imposed in Counts 1,2,3 & 4. The sentence imposed in Counts 1,2,3 & 4 shall run concurrently to each other. It is further ordered that the defendant shall pay fines as follows in regards to Counts 1-16: Ct. 1, $10,000; Cts. 2-4, $10,000 as to each count; Cts. 5-6, $100,000 as to each count; Cts. 7-9, $5,000 as to each count; Cts. 10-11, $100,000 as to each count; Cts. 12, 13, 14 & 15, $500,000 as to each count; and Ct. 16, $5,000. The fines shall run consecutively to each other and shall be paid within 30 days of the date of sentencing. It is further ordered that the defendant shall pay the costs of prosecution of this case the amount of $73,651.55 equally with codefendant David A. Sturman. It is further ordered that the defendant shall remain on the same bond pending timely appeal.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

* * *

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

* * *

February 12, 1990
Date of Imposition of Sentence

/s/ George W. White
Signature of Judicial Officer

George W. White, U.S. District Judge
Name and Title of Judicial Officer

February 15, 1990
Date

APPENDIX T

CONSTITUTIONAL PROVISIONS, TREATY, STATUTES AND REGULATIONS INVOLVED

I.

CONSTITUTION OF THE UNITED STATES

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by a impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

II.

TREATY ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS, MAY 25, 1973, UNITED STATES – SWISS CONFEDERATION, 27 U.S.T. 2019, T.I.A.S. NO. 8302

Chapter I

APPLICABILITY

Article 1

Obligation to Furnish Assistance

1. The Contracting Parties undertake to afford each other, in accordance with provisions of this Treaty, mutual assistance in:

   a. investigation or court proceedings in respect of offenses the punishment of which falls or would fall within the jurisdiction of the judicial authorities of the requesting State or a state or canton thereof;

   b. effecting the return to the requesting State, or a state or canton thereof, of any objects, articles or other property or assets belonging to it and obtained through such offenses;

   c. proceedings concerning compensation for damages suffered by a person through unjustified detention as a result of action taken pursuant to this Treaty.

2. For the purposes of this Treaty, an offense in the requesting State is deemed to have been committed if there exists in that State a reasonable suspicion that acts have been committed which constitute the elements of that offense.

3. The competent authorities of the Contracting Parties may agree that assistance as provided by this Treaty will also be granted in certain ancillary administrative proceedings in respect of measures which may be taken against the perpetrator of an offense falling within the purview of this Treaty. Agreements to this effect shall be concluded by exchange of diplomatic notes.

4. Assistance shall include, but not be limited to:
   a. ascertaining the whereabouts and addresses of persons;
   b. taking the testimony or statements of persons;
   c. effecting the production or preservation of judicial and other documents, records, or articles of evidence;
   d. service of judicial and administrative documents; and
   e. authentication of documents.

Article 2

Non-Applicability

1. This Treaty shall not apply to:
   a. extradition or arrests of persons accused or convicted of having committed an offense;
   b. execution of judgments in criminal matters;
   c. investigations or proceedings:
      (1) concerning an offense which the requested State considers a political offense or an offense connected with a political offense;
      (2) concerning offenses in violation of the laws relating to military obligations;
      (3) concerning acts by a person subject to military law in the requesting State which constitute an offense under military law in that State but which would not constitute an offense in the requested State if committed by a person not subject to military law in the requested State;
      (4) for the purpose of enforcing cartel or antitrust laws; or
      (5) concerning violations with respect to taxes, customs duties, governmental monopoly charges or exchange control regulations other than the offenses listed

in items 26 and 30 of the Schedule to this Treaty (Schedule) and the related offenses in items 34 and 35 of the Schedule.

2. Nevertheless, assistance shall be granted if a request concerns an investigation or proceeding referred to in subparagraphs c. (1), (4) and (5) of paragraph 1, if made for the purpose of investigating or prosecuting a person described in paragraph 2 of Article 6 and

a. in the case of subparagraphs c. (1) and (4), the request relates to an offense committed in furtherance of the purposes of an organized criminal group described in paragraph 3 of Article 6, or

b. in the case of subparagraph c. (5), any applicable conditions of Article 7 are satisfied.

3. Contributions to social security and governmental health plans, even if levied as taxes, shall not be considered as taxes for the purpose of this Treaty.

4. If the acts described in the request contain all the elements of an offense for the investigation or prosecution of which assistance is required to be or may be granted as well as all the elements of an offense for which such assistance cannot be granted, assistance shall not be granted if under the law of the requested State punishment could be imposed only for the latter offense unless it is listed in the Schedule.

* * *

Chapter II

SPECIAL PROVISIONS CONCERNING ORGANIZED CRIME

Article 6

General Requirements

1. The Contracting Parties agree to assist each other in the fight against organized crime as provided in this Chapter and with all means otherwise available under this Treaty and other provisions of law.

2. This Chapter shall apply only to investigations and proceedings involving a person who, according to the request, is or is reasonably suspected to be:

a. knowingly involved in the illegal activities of an organized criminal group, described in paragraph 3, and who is:

(1) a member of such a group; or

(2) an affiliate of such a group performing supervisory or managerial functions or regularly supporting it or its members by performing other important services; or

(3) a participant in any important activity of such a group; or

b. a public official who has violated his official responsibilities in order to knowingly accomodate [sic] the desires of such a group or its members.

3. For the purposes of this Chapter the term "organized criminal group" refers to an association or group of persons combined together for a substantial or indefinite period for the purposes of obtaining monetary or commercial gains or profits for itself or for others, wholly or in part by illegal means, and of protecting its illegal activities against criminal prosecution and which, in carrying out its purposes, in a methodical and systematic manner:

a. at least in part of its activities, commits or threatens to commit acts of violence or other acts which are likely to intimidate and are punishable in both States; and

b. either:

(2) strives to obtain influence in politics or commerce, especially in political bodies or organizations, public administrations, the judiciary, in commercial enterprises, employers' associations or trade unions or other employees' associations; or

(2) associates itself formally or informally with one or more similar associations or

groups, at least one of which engages in the activities described under subparagraph b (1).

Article 7

Extent of Assistance

1. Compulsory measures referred to in Article 4 shall also be employed in the requested State even if the investigation or proceeding in the requesting State concerns acts which would not be punishable under the law in the requested State, or which are not listed in the Schedule, or neither. This paragraph is subject to the limitations of paragraph 2.

2. Assistance under this Chapter shall be rendered in investigations or proceedings involving violations of provisions on taxes on income referred to in Article I of the Convention of May 24, 1951, for the Avoidance of Double Taxation with Respect to Taxes on Income[1] only if, according to the information furnished by the requesting State:

a. the person involved in the investigation or proceeding is reasonably suspected by it of belonging to an upper echelon of an organized criminal group or of participating significantly, as a member, affiliate or otherwise, in any important activity of such a group;

b. the available evidence is in its opinion insufficient, for the purpose of a prosecution which has a reasonable prospect of success, to link such person with the crimes committed by the organized criminal group with which he is connected in the sense of paragraph 2 of Article 6; and

c. it has been reasonably concluded by it that the requested assistance will substantially facilitate the successful prosecution of such person and

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[1] TIAS 2316; 2 UST 1753.

should result in his imprisonment for a sufficient period of time so as to have a significant adverse effect on the organized criminal group.

3. Paragraphs 1 and 2 apply only if the requesting State reasonably concludes that the securing of the information or evidence is not possible without the cooperation of the authorities in the requested State, or that it would place unreasonable burdens on the requesting State or a state or canton thereof.

Article 8

Applicable Procedure

1. In all cases where this Chapter requires a reasonable suspicion or a reasonable conclusion, or the opinion of the requesting State, that State shall furnish to the requested State information in its possession on the basis of which such suspicion, conclusion, or opinion has been arrived at. However, this shall not oblige the requesting State to identify the persons who have provided such information. Upon application of the requesting State, the Central Authority of the requested State shall treat any information furnished in the request as confidential.

* * *

SCHEDULE

OFFENSES FOR WHICH COMPULSORY MEASURES ARE AVAILABLE

1. Murder.
2. Voluntary manslaughter.
3. Involuntary manslaughter.
4. Malicious wounding; inflicting grievous bodily harm intentionally or through gross negligence.
5. Threat to commit murder; threat to inflict grievous bodily harm.
6. Unlawful throwing or application of any corrosive or injurious substances upon the person of another.

7. Kidnaping; false imprisonment or other unlawful deprivation of the freedom of an individual.
8. Willful nonsupport or willful abandonment of a minor or other dependent person when the life of that minor or other dependent person is or is likely to be injured or endangered.
9. Rape; indecent assault.
10. Unlawful sexual acts with or upon children under the age of sixteen years.
11. Illegal abortion.
12. Traffic in women and children.
13. Bigamy.
14. Robbery.
15. Larceny; burglary; house-breaking or shop-breaking.
16. Embezzlement; misapplication or misuse of funds.
17. Extortion; blackmail.
18. Receiving or transporting money, securities or other property, knowing the same to have been embezzled, stolen or fraudulently obtained.
19. Fraud, including:
    a. obtaining property, services, money or securities by false pretenses or by defrauding by means of deceit, falsehood or any fraudulent means;
    b. fraud against the requesting State, its states or cantons or municipalities thereof;
    c. fraud or breach of trust committed by any person;
    d. use of the mails or other means of communication with intent to defraud or deceive, as punishable under the laws of the requesting State.
20. Fraudulent bankruptcy.
21. False business declarations regarding companies and cooperative associations, inducing speculation, unfaithful management, suppression of documents.
22. Bribery, including soliciting, offering and accepting.

23. Forgery and counterfeiting, including:
    a. the counterfeiting or forgery of public or private securities, obligations, instructions to make payment, invoices, instruments of credit or other instruments;
    b. the counterfeiting or alteration of coin or money;
    c. the counterfeiting or forgery of public seals, stamps or marks;
    d. the fraudulent use of the foregoing counterfeited or forged articles;
    e. knowingly and without lawful authority, making or having in possession any instrument, instrumentality, tool or machine adapted or intended for the counterfeiting of money, whether coin or paper.
24. Knowingly and willfully making, directly or through another, a false, fictitious or fraudulent statement or representation in a matter within the jurisdiction of any department or agency in the requesting State, and relating to an offense mentioned in this Schedule or otherwise falling under this Treaty.
25. Perjury, subornation of perjury and other false statements under oath.
26. Offenses against the laws relating to bookmaking, lotteries and gambling when conducted as a business.
27. Arson.
28. Willful and unlawful destruction or obstruction of a railroad, aircraft, vessel or other means of transportation or any malicious act done with intent to endanger the safety of any person travelling upon a railroad, or in any aircraft, vessel or other means of transportation.
29. Piracy; mutiny or revolt on board an aircraft or vessel against the authority of the captain or commander of such aircraft or vessel; any seizure or exercise of control, by force or violence or threat of force or violence, of an aircraft or vessel.
30. Offenses against laws (whether in the form of tax laws or other laws) prohibiting, restricting or controlling the

traffic in, importation or exportation, possession, concealment, manufacture, production or use of:

a. narcotic drugs, cannabis sativa-L, psychotropic drugs, cocaine and its derivatives;

b. poisonous chemicals and substances injurious to health;

c. firearms, other weapons, explosive and incendiary devices;

when violation of such laws causes the violator to be liable to criminal prosecution and imprisonment.

31. Unlawful obstruction of court proceedings or proceedings before governmental bodies or interference with an investigation of a violation of a criminal statute by the influencing, bribing, impeding, threatening, or injuring of any officer of the court, juror, witness, or duly authorized criminal investigator.

32. Unlawful abuse of official authority which results in deprivation of the life, liberty or property of any person.

33. Unlawful injury, intimidation or interference with voting or candidacy for public office, jury service, government employment, or the receipt or enjoyment of benefits provided by government agencies.

34. Attempts to commit, conspiracy to commit, or participation in, any of the offenses enumerated in the preceding paragraphs of this Schedule; accessory after the fact to the commission of any of the offenses enumerated in this Schedule.

35. Any offense of which one of the above listed offenses is a substantial element, even if, for purposes of jurisdiction of the United States Governement [sic], elements such as transporting, transportation, the use of the mails or interstate facilities are also included.

III.

SWISS FEDERAL BANKING LAW*

Art. 47

1. Whoever divulges a secret entrusted to him in his capacity as officer, employee, mandatory, liquidator or commissioner of a bank, as a representative of the Banking Commission, officer or employee of a recognized auditing company, or who has become aware of such a secret in this capacity, and whoever tries to induce others to violate professional secrecy, shall be punished by a prison term not to exceed six months or by a fine not exceeding 50,000 francs.

2. If the act has been committed by negligence, the penalty shall be a fine not exceeding 30,000 francs.

3. The violation of professional secrecy remains punishable even after termination of the official or employment relationship or the exercise of the profession.

4. Federal and cantonal regulations concerning the obligation to testify and to furnish information to a government authority shall remain reserved.

IV.

TITLE 18, UNITED STATES CODE

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

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* Translation performed and published by Union Bank of Switzerland, Zurich.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

§ 3505. Foreign records of regularly conducted activity

(a)(1) In a criminal proceeding in a court of the United States, a foreign record of regularly conducted activity, or a copy of such record, shall not be excluded as evidence by the hearsay rule if a foreign certification attests that –

(A) such record was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters;

(B) such record was kept in the course of a regularly conducted business activity;

(C) the business activity made such a record as a regular practice; and

(D) if such record is not the original, such record is a duplicate of the original;

unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

(2) A foreign certification under this section shall authenticate such record or duplicate.

(b) At the arraignment or as soon after the arraignment as practicable, a party intending to offer in evidence under this section a foreign record of regularly conducted activity shall provide written notice of that intention to each other party. A motion opposing admission in evidence of such record shall be made by the opposing party and determined by the court before trial. Failure by a party to file such motion before trial shall constitute a waiver of objection to such record or duplicate, but the court for cause shown may grant relief from the waiver.

(c) As used in this section, the term –

(1) "foreign record of regularly conducted activity" means a memorandum, report, record, or

data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, maintained in a foreign country;

(2) "foreign certification" means a written declaration made and signed in a foreign country by the custodian of a foreign record of regularly conducted activity or another qualified person that, if falsely made, would subject the maker to criminal penalty under the laws of that country; and

(3) "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

V.

TITLE 26, UNITED STATES CODE

§ 7201. Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

§ 7206. Fraud and false statements

Any person who –

(1) Declaration under penalties of perjury. – Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) Aid or assistance. – Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material

matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; or

(3) Fraudulent bonds, permits, and entries. – Simulates or falsely or fraudulently executes or signs any bond, permit, entry, or other document required by the provisions of the internal revenue laws, or by any regulation made in pursuance thereof, or procures the same to falsely or fraudulently executed, or advises, aids in, or connives at such execution thereof; or

(4) Removal or concealment with intent to defraud. – Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title; or

(5) Compromises and closing agreements. – In connection with any compromise under section 7122, or offer of such compromise, or in connection with any closing agreement under section 7121, or offer to enter into any such agreement, willfully –

> **(A) Concealment of property.** – Conceals from any officer or employee of the United States any property belonging to the estate of a taxpayer or other person liable in respect of the tax, or
>
> **(B) Withholding, falsifying, and destroying records.** – Receives, withholds, destroys, mutilates, or falsifies any book, document, or record, or makes any false statement, relating to the estate or financial condition of the taxpayer or other person liable in respect of the tax;

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

VI.

TITLE 28, UNITED STATES CODE

§ 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

* * *

VII.

TITLE 31, UNITED STATES CODE

§ 1059. Additional criminal penalty in certain cases

Whoever willfully violates any provision of this chapter where the violation is –

(1) committed in furtherance of the commission of any other violation of Federal law, or

(2) committed as part of a pattern of illegal activity involving transactions exceeding $100,000 in any twelve-month period.

shall be fined not more than $500,000 or imprisoned not more than five years, or both.

Pub.L. 91-508, Title II, § 210, Oct. 26, 1970, 84 Stat. 1121.

§ 1121. Records and reports

(a) The Secretary of the Treasury, having due regard for the need to avoid impeding or controlling the export or import of currency or other monetary instruments and having due regard also for the need to avoid burdening unreasonably persons who legitimately engage in transactions with foreign financial agencies, shall by regulation require any resident or citizen of the United States, or person in the United States and doing business therein, who engages in any transaction or maintains any relationship, directly or indirectly, on behalf of himself or another, with a foreign financial agency to maintain records or to file reports, or both, setting forth such of the following information, in such form and in such detail, as the Secretary may require:

(1) The identities and addresses of the parties to the transaction or relationship.

(2) The legal capacities in which the parties to the transaction or relationship are acting, and the identities of the real parties in interest if one or

more of the parties are not acting solely as principals.

(3) A description of the transaction or relationship including the amounts of money, credit, or other property involved.

(b) No person required to maintain records under this section shall be required to produce or otherwise disclose the contents of the records except in compliance with a subpena or summons duly authorized and issued or as may otherwise be required by law.

Pub.L. 91-508, Title II, § 241, Oct. 26, 1970, 84 Stat. 1124.

§ 5314. Records and reports on foreign financial agency transactions

(a) Considering the need to avoid impeding or controlling the export or import of monetary instruments and the need to avoid burdening unreasonably a person making a transaction with a foreign financial agency, the Secretary of the Treasury shall require a resident or citizen of the United States or a person in, and doing business in, the United States, to keep records, file reports, or keep records and file reports, when the resident, citizen, or person makes a transaction or maintains a relation for any person with a foreign financial agency. The records and reports shall contain the following information in the way and to the extent the Secretary prescribes:

(1) the identity and address of participants in a transaction or relationship.

(2) the legal capacity in which a participant is acting.

(3) the identity of real parties in interest.

(4) a description of the transaction.

(b) The Secretary may prescribe –

(1) a reasonable classification of persons subject to or exempt from a requirement under this section or a regulation under this section;

(2) a foreign country to which a requirement or a regulation under this section applies if the

Secretary decides applying the requirement or regulation to all foreign countries is unnecessary or undesirable;

(3) the magnitude of transactions subject to a requirement or a regulation under this section;

(4) the kind of transaction subject to or exempt from a requirement or a regulation under this section; and

(5) other matters the Secretary considers necessary to carry out this section or a regulation under this section.

(c) A person shall be required to disclose a record required to be kept under this section or under a regulation under this section only as required by law.

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 997.)

§ 5322. Criminal penalties

(a) A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315) shall be fined not more than $1,000, imprisoned for not more than one year, or both.

(b) A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315), while violating another law of the United States or as part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned for not more than 5 years, or both.

(c) For a violation of section 5318(2) of this title or a regulation prescribed under section 5318(2), a separate violation occurs for each day the violation continues and at each office, branch, or place of business at which a violation occurs or continues.

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 1000.)

VIII.

TITLE 31, CODE OF FEDERAL REGULATIONS

§ 103.24. Reports of foreign financial accounts.

Each person subject to the jurisdiction of the United States (except a foreign subsidiary of a U.S. person) having a financial interest in, or signature or other authority over, a bank, securities or other financial account in a foreign country shall report such relationship to the Secretary for each year in which such relationship exists, and shall provide such information as shall be specified in a reporting form prescribed by the Secretary to be filed by such persons. Persons having a financial interest in 25 or more foreign financial accounts need only note that fact on the form. Such persons will be required to provide detailed information concerning each account when so requested by the Secretary or his delegate.

§ 103.32. Records to be made and retained by persons having financial interests in foreign financial accounts.

Records of accounts required by § 103.24 to be reported on a Federal income tax return shall be retained by each person having a financial interest in any such account. Such records shall contain the name in which each such account is maintained, the number or other designation of such account, the name and address of the foreign bank or other person with whom such account is maintained, the type of such account, and the maximum value of each such account during the reporting period. Such records shall be retained for a period of 5 years and shall be kept at all times available for inspection as authorized by law. In the computation of the period of 5 years, there shall be disregarded any period beginning with a date on which the taxpayer is indicted or information instituted on account of the filing of a false or fraudulent Federal income tax return or failing to file a Federal income tax return, and ending with the date on which final disposition is made of the criminal proceeding.

IX.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 15. Depositions

(a) When Taken. Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place. If a witness is detained pursuant to section 3144 of title 18, United States Code, the court on written motion of the witness and upon notice to the parties may direct that the witness' deposition be taken. After the deposition has been subscribed the court may discharge the witness.

* * *

(d) How Taken. Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner provided in civil actions except as otherwise provided in these rules, provided that (1) in no event shall a deposition be taken of a party defendant without that defendant's consent, and (2) the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself. The government shall make available to the defendant or the defendant's counsel for examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the government and to which the defendant would be entitled at the trial.

* * *

X.

FEDERAL RULES OF EVIDENCE

Rule 602. Lack of Personal Knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

Rule 901. Requirement of Authentication or Identification

(a) General provision

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations

By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge

Testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting

Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness

Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like

Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification

Identification of a voice, whether heard first-hand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations

Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports

Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation

Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or system

Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule

Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

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Supreme Court, U.S.
FILED
MAY 26 1992
OFFICE OF THE CLERK

Nos. 91-1367, 91-1533 and 91-1596

In the Supreme Court of the United States

OCTOBER TERM, 1991

DAVID A. STURMAN, PETITIONER

v.

UNITED STATES OF AMERICA

RALPH LEVINE AND MELVIN KAMINSKY, PETITIONERS

v.

UNITED STATES OF AMERICA

REUBEN STURMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners were properly convicted of conspiracy to defraud the United States, in violation of 18 U.S.C. 371, by impeding the lawful functions of the Internal Revenue Service (Nos. 91-1533 and 91-1596 only).

2. Whether testimony of foreign witnesses from court-ordered depositions conducted in Switzerland with the participation of all interested parties and counsel was properly admitted at petitioners' criminal trial.

3. Whether 18 U.S.C. 3505, which governs the admissibility of foreign business records, violates the Confrontation Clause (Nos. 91-1533 and 91-1596 only).

4. Whether petitioner Reuben Sturman was entitled to challenge factual assertions made by the United States to the Swiss government in obtaining Swiss bank records pursuant to a mutual assistance treaty (No. 91-1596 only).

5. Whether the trial judge was required to recuse himself (No. 91-1596 only).

6. Whether separate fines could be imposed on petitioner Reuben Sturman for filing a false income tax return (26 U.S.C. 7206(1)) and attempted tax evasion (26 U.S.C. 7201) (No. 91-1596 only).

7. Whether the reporting requirements of the Bank Secrecy Act violate the Fifth Amendment privilege against compelled self-incrimination (No. 91-1596 only).

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-42a) [1] is reported at 951 F.2d 1466.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1991. Petitions for rehearing were denied on January 8, 1992. The petition for a writ of certiorari in No. 91-1367 was filed on February 26, 1992; the petition in No. 91-1533 was filed on March 24, 1992; and the petition in No. 91-1596 was filed on April 3, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Ohio, petitioners were convicted of conspiracy to defraud the United States, in violation of 18 U.S.C. 371, by impeding the lawful functions of the Internal Revenue Service.[2] Petitioner Reuben Sturman was convicted of several additional offenses: five counts of attempted income tax evasion (26 U.S.C. 7201); five counts of making and subscribing a false income tax return (26 U.S.C. 7206(1)); four counts of willfully failing to maintain records and file reports of transactions and relationships with a foreign financial institution (31 U.S.C. 1059, as recodified at 31 U.S.C. 5322, effective September 13, 1982); and one count of obstructing justice (18 U.S.C. 1503). The district court sen-

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[1] Unless otherwise noted, references are to the petition appendix in No. 91-1367.

[2] Petitioner Kaminsky entered a conditional guilty plea and joined in the appeal in this case.

tenced petitioner David Sturman to a four-year prison term; in addition, he was fined $10,000 and ordered to pay $73,651.55 in costs of prosecution equally with petitioner Reuben Sturman. Petitioner Ralph Levine was sentenced to a three-year prison term and a $10,000 fine. Petitioner Melvin Kaminsky was sentenced to a one-year prison term, to be followed by two years' probation and a $50,000 fine. Petitioner Reuben Sturman was sentenced to a total of ten years' imprisonment, was fined $2,460,000, and was ordered to pay $73,651.55 in costs of the prosecution equally with petitioner David Sturman. The court of appeals affirmed. Pet. App. 1a-42a.

1. The evidence at trial showed that, from 1968 through 1987, petitioners conspired among themselves and with others to obstruct the lawful functions of the IRS in the assessment and collection of taxes owed by Reuben Sturman. Reuben Sturman engaged in the production, distribution, and sale of sexually explicit books and other materials. David Sturman was responsible for his father Reuben's businesses in the San Francisco area. Levine ran the Nevada businesses, while Kaminsky ran Reuben Sturman's principal business, Sovereign News Company. Pet. App. 2a-3a.

Reuben Sturman skimmed cash profits from his adult bookstores, peep shows, and other businesses. He concealed his ownership of those businesses by establishing more than 150 domestic corporations and five foreign corporations in countries with strict secrecy policies. The domestic companies were owned by nominees and run by fictitious officers. Reuben Sturman also opened several Swiss bank accounts with the stated goal of "conceal[ing] his money" and "avoid[ing] taxes." Money was transferred to

the Swiss accounts through a series of transfers involving the domestic and foreign companies. Pet. App. 2a-3a; Gov't C.A. Br. 3-35.

Reuben Sturman did not report all of his income and corporate transactions to the IRS; indeed, he reported less than 11 percent of his income between 1978 and 1982. His unreported income for those years was $2,735,713, creating a tax liability of $1,442,945. Moreover, he improperly failed to disclose on tax forms his various foreign accounts. Pet. App. 3a; Gov't C.A. Br. 31-35.

2. David Sturman, Levine, and Kaminsky, in addition to running various of Reuben Sturman's businesses, helped conceal Reuben's overall assets and income in several ways. For example, David Sturman was the director and nominee shareholder of Societe Financiere, a Liberian shell company used by Reuben Sturman to receive and funnel proceeds from his adult entertainment businesses. David Sturman also had signature authority over Societe Financiere's Swiss bank account, as well as more than 20 other Swiss accounts that were used to conceal assets and income. David and Reuben Sturman signed the names of fictitious persons to most of the accounts. For example, in 1974, Reuben Sturman used a false Dutch passport to open two Swiss accounts under the alias of Paul Bekker. When Reuben Sturman was later arrested by Swiss authorities for falsifying identification papers, the authorities seized a document signed by Sturman in which "Paul Bekker" granted power of attorney for those two accounts to David Sturman. Reuben Sturman admitted to Swiss authorities that he used the account to receive proceeds funneled from his American businesses. Pet. App. 2a, 9a; Gov't C.A. Br. 12-13, 15, 57-58.

Similarly, Levine aided Reuben Sturman in concealing assets from the IRS. Jack Marcum, who was employed by Levine and Reuben Sturman, testified that at least $70,000 per month from the Nevada businesses went unrecorded. Levine also had signature authority (under various aliases) over several Swiss bank accounts, which were never reported to the IRS. Finally, Kaminsky, the manager of Reuben Sturman's principal business, provided substantial assistance to Reuben Sturman's efforts to conceal his financial interests from the IRS. Pet. App. 9a-10a; Govt's C.A. Br. 5-6.

3. In 1985, the district court issued a pretrial order authorizing overseas depositions of Swiss bank officials pursuant to Fed. R. Crim. P. 15. Pet. App. 43a. Those depositions, and the trial itself, were delayed several years as petitioners raised various objections both in this country and in Switzerland. See *id.* at 44a. In an order dated May 4, 1989, the district court noted that "[o]n April 11, 1989, the Swiss Supreme Court denied all oppositions filed concerning the Swiss depositions previously ordered by this Court." *Id.* at 48a. The order noted that the depositions would be held before Swiss Magistrate Benedikt Holdener in Zurich during the week of June 5-9, 1989. *Ibid.* The court ordered that "direct examination (as opposed to cross-examination)" questions for the five Swiss witnesses be submitted in writing to Magistrate Holdener no later than May 22, 1989. *Id.* at 48a-49a. The government was ordered to pay the travel expenses for petitioners and their attorneys. *Id.* at 45a, 49a.

Petitioners were represented at the depositions by eight American attorneys and six Swiss attorneys.[3]

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[3] Although petitioners all had the right to be present, Reuben Sturman was the only petitioner who personally attended the depositions.

At the outset of each deposition, Magistrate Holdener warned the witness of the penalties under Swiss law for giving false testimony. Holdener then posed to each witness the questions submitted by the government. The proceedings were conducted in the German language, but English translations were provided by an official Swiss interpreter. In addition, the six bilingual Swiss attorneys provided the defense team with a virtually verbatim translation of the German questions and answers. After direct examination, defense counsel submitted oral questions to Holdener, who again posed them to the witness. All questions posed by defense counsel, except one relating to the compensation of one witness, were asked of the witness. Although an American court reporter was present, Holdener contemporaneously dictated the official, substantially verbatim summary version of the testimony. At the conclusion of each deposition, the witness read Holdener's summary, was permitted to correct any inaccuracies, and then signed it. Pet. App. 21a; Gov't C.A. Br. 91-92.

4. The trial of this case lasted three months. The written summaries of the Swiss depositions that were read into the record at trial in question and answer form occupied fewer than 60 of the 5000 pages of transcript. See C.A. Jt. App. 2003-2059. The depositions concerned some of the Swiss bank accounts that petitioners had opened under various names. *Ibid.*

The district court admitted the depositions after reviewing them and considering defense objections. The court found that "the defendants were entitled to be present there, they were entitled to have counsel there, counsel for the government was entitled to have questions read, and it appears to me that counsel for the defendants were entitled to submit questions to

the magistrate for answers by the witnesses." Pet. App. 21a.

5. The court of appeals affirmed petitioners' convictions. Pet. App. 1a-42a. The court first held that petitioners properly were convicted of conspiring to defraud the United States, in violation of 18 U.S.C. 371. Pet. App. 3a-7a. The court distinguished its prior decision in *United States* v. *Minarik*, 875 F.2d 1186 (6th Cir. 1989). Pet. App. 5a-7a. In addition, the court rejected challenges by petitioners David Sturman and Levine to the factual sufficiency of the evidence and to the factual support for the existence of a single conspiracy. *Id.* at 8a-12a.

The court of appeals next held that the Swiss depositions had properly been admitted. Pet. App. 20a-24a. The court held that there had been substantial compliance with Fed. R. Crim. P. 15 and that petitioners' constitutional rights had been protected. Pet. App. 22a-23a. The court explained that "[d]epositions taken in foreign countries cannot at all times completely emulate the United States' method of obtaining testimony" but that "[h]ere, all steps were taken to ensure [petitioners'] rights while respecting the legal rules established in a different country." *Id.* at 22a. Addressing petitioners' specific challenges to the Swiss procedures, the court noted that "[a]ll defense questions, with just one exception, were submitted to the witnesses so that objections and determinations on admissibility could be litigated later." *Ibid.* (footnote omitted). The court also noted that, "[a]lthough the witnesses were not given an oath, [the] defense conceded that each witness was told the penalties for giving false testimony." *Ibid.* The court found that petitioners "failed to point to any way in which they were prejudiced by the procedures used." *Id.* at 23.

The court also rejected claims that Swiss Magistrate Holdener should not have been allowed to preside over the depositions because he was not impartial. Pet. App. 23a. The court noted that, although Swiss law "permits a person to serve as both magistrate and prosecuting attorney," petitioners "failed to establish evidence that Magistrate Holdener's handling of the deposition unfairly prejudiced [petitioners] or that the testimony could be considered unreliable." *Ibid.* Finally, the court rejected challenges to the manner in which one Swiss deponent had identified Reuben Sturman as a former customer. *Id.* at 23a-24a.

The court further held that "[v]olumes of business records from seven foreign banks" had properly been admitted at trial pursuant to 18 U.S.C. 3505. Pet. App. 39a-42a. The court explained that the statutory prerequisites to admission of foreign business records had been satisfied, and that the statute did not violate the Confrontation Clause. *Ibid.*

Finally, in addition to other claims not renewed by petitioners in this Court, the court of appeals rejected several claims that only petitioner Reuben Sturman renews. The court held that Reuben Sturman was not entitled to challenge factual assertions made by the United States in obtaining Swiss bank records pursuant to a mutual assistance treaty (Pet. App. 26a-31a); that the district court was not required to recuse itself (*id.* at 24a-26a); that the district court permissibly imposed consecutive fines for filing a false income tax return and for attempted tax evasion (*id.* at 36a-37a); and that the reporting requirements of the Bank Secrecy Act do not violate the Fifth Amendment privilege against compelled self-incrimination (*id.* at 34a-36a).

ARGUMENT

1. Petitioners Levine and Kaminsky (91-1533 Pet. 4-12) and petitioner Reuben Sturman (91-1596 Pet. 29-30) seek further review of their claim that they were improperly convicted of conspiring to defraud the United States, in violation of 18 U.S.C. 371. There was overwhelming evidence that petitioners conspired to conceal Reuben Sturman's assets from the Internal Revenue Service. Petitioners claim, however, that such a conspiracy should not be actionable under 18 U.S.C. 371 as a conspiracy to defraud the United States. That claim is meritless.

The federal conspiracy statute, 18 U.S.C. 371, prohibits conspiracies "either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose." This Court has broadly interpreted the "defraud" clause of the conspiracy statute, holding that it "reaches any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of Government." *Tanner* v. *United States*, 483 U.S. 107, 128 (1987) (quotation omitted). Accordingly, the Court has rejected any suggestion that the "offense" and "defraud" clauses are mutually exclusive, such that a prosecution under the latter clause turns on whether defendants conspired to commit a specific substantive offense. For example, in *Dennis* v. *United States*, 384 U.S. 855 (1966), the defendants were convicted of conspiring to defraud the United States by filing false affidavits with the National Labor Relations Board. They argued that the case involved "a conspiracy to commit the substantive offense of filing false statements in violation of 18 U.S.C. 1001" and that their misconduct "may not properly be laid under

the conspiracy-to-defraud clause of § 371." 384 U.S. at 862-863. This Court held that "[t]he fact that the events [charged] include the filing of false statements does not, in and of itself, make the conspiracy-to-defraud clause of § 371 unavailable to the prosecution." *Id.* at 863-864.

Petitioners claim (91-1533 Pet. 5-12) that the Sixth Circuit's decision in this case conflicts with its prior decision in *United States* v. *Minarik*, 875 F.2d 1186 (1989). Even if petitioners were correct, further review by this Court would not be warranted to resolve an intra-circuit conflict. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

In any event, the court of appeals in this case carefully distinguished its prior holding in *Minarik*. See Pet. App. 4a-7a. *Minarik* held that the offense and defraud clauses of the conspiracy statute were mutually exclusive "as applied to the facts of [that] case." 875 F.2d at 1187. The facts in *Minarik*, which involved the concealment of assets after a taxpayer had received assessment notices, fell squarely within the prohibition contained in 26 U.S.C. 7206(4) relating to post-assessment concealment. See 875 F.2d at 1187, 1194-1195. Although the government could have brought a straightforward charge of conspiracy to violate 26 U.S.C. 7206(4), it instead proceeded under the defraud clause while changing its theory of the case several times without further specifying the charge. See 875 F.2d at 1187, 1190. Notwithstanding broader dicta in the opinion, the *Minarik* court's actual holding was very narrow: "[W]here the duties of a citizen are as technical and difficult to discern as they are when a taxpayer, before levy, engages in otherwise legitimate activities that may make ultimate collection more difficult, we hold that

a Congressional statute closely defining those duties takes a conspiracy to avoid them out of the defraud clause and places it in the offense clause." *Id.* at 1196. The court took pains "to emphasize the limits of our holding." *Id.* at 1195-1196.

We believe that *Minarik* was wrongly decided even on its own facts. The decision finds no support in the language of the statute; it conflicts with *Dennis* and *Tanner*; and its interpretation of the conspiracy statute is unworkable in practice. But even assuming that *Minarik* was correctly decided, the court of appeals correctly declined to extend it to the very different factual setting of this case. Unlike *Minarik*, the conspiracy here was far broader than the violation of a single substantive statute. As the court of appeals explained (Pet. App. 7a), "[o]nly the defraud clause can adequately cover all the nuances of a conspiracy of the magnitude this case addresses." As the court of appeals also explained (*ibid.*), the "chief concern" in *Minarik* "was that the government, by constantly changing the prosecution theory, never adequately informed the defendant of the charges against him." Here, in contrast, "[t]he prosecution has presented the case clearly and no confusion as to the charges is evident." *Ibid.*[4]

2. The Swiss deposition testimony was properly admitted under Fed. R. Evid. 804(b)(1) and Fed. R. Crim. P. 15(e). Rule 804(b)(1) allows the ad-

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[4] Other courts have declined to give *Minarik* the broad reading petitioners seek to accord it, and this Court has denied certiorari notwithstanding claims that those decisions conflict with *Minarik*. See, *e.g.*, *United States* v. *Bilzerian*, 926 F.2d 1285 (2d Cir.), cert. denied, 112 S. Ct. 63 (1991); *United States* v. *Reynolds*, 919 F.2d 435, 439 (7th Cir. 1990), cert. denied, 111 S. Ct. 1402 (1991).

mission of testimony given by unavailable witnesses at "a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered * * * had an opportunity and similar motive to develop the testimony by direct, cross, or redict examination." Rule 15(e) likewise provides that "[a]t the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable."

The procedures followed in ordering and taking the Swiss depositions complied with Fed. R. Crim. P. 15. Subsection (a) of that Rule allows depositions "[w]henever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial." Petitioners do not challenge the district court finding that this case satisfied the prerequisites of subsection (a). Subsection (b) of the Rule requires adequate advance notice, and subsection (c) requires government payment of defense travel and subsistence expenses. Again, petitioners do not suggest that the Swiss deposition proceedings failed to satisfy these provisions.

Petitioners claim that the Swiss depositions failed to comply with subsection (d) of Rule 15. That provision, in pertinent part, reads as follows:

> **(d) How Taken.** Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner provided in civil actions except as otherwise provided in these rules, provided that (1) in no event shall a deposition be taken of a party defendant without that defendant's consent, and (2) the scope

> and manner of examination and cross-examination shall be such as would be allowed in the trial itself.

The depositions in this case were "taken" in the manner provided in civil actions. Although cross-examination was not done "directly by counsel" (91-1367 Pet. 22), the civil rules expressly provide for "depositions upon written questions" (Fed. R. Civ. P. 31). Similarly without merit are complaints (91-1367 Pet. 16-17, 22-24) that the Swiss witnesses were not placed under oath and there was no "verbatim transcript." The federal civil discovery rules incorporated by Criminal Rule 15(d) recognize that, as the court of appeals explained (Pet. App. 22a), "[d]epositions taken in foreign countries cannot at all times completely emulate the United States' method of obtaining testimony." Thus, Fed. R. Civ. P. 28(b) provides: "Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar deparure from the requirements for depositions taken within the United States under these rules." [5] The Advisory Committee notes to Rule 28 explain:

> [T]he courts of other countries may be expected to follow their customary procedure for

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[5] The Mutual Assistance Treaty, U.S.-Switz., 27 U.S.T. 2019, T.I.A.S. No. 8302 (1973) (*reprinted in part* at Pet. App. 76a-83a), allows a request for assistance to be made by the "Central Authority" (defined as "the Attorney General or his designee") and thus obviates the need for an American court to issue a letter rogatory. No substantive difference flows from the fact that a letter rogatory was not issued in this case, however, and the clear intent of the federal rules is that foreign depositions need not follow the precise form of depositions taken in this country.

> taking testimony. In many non-common-law countries the judge questions the witness, sometimes without first administering an oath, the attorneys put any supplemental questions either to the witness or through the judge, and the judge dictates a summary of the testimony, which the witness acknowledges as correct. The last sentence of [Rule 28(b)] provides, contrary to the implications of some authority, that evidence recorded in such a fashion need not be excluded on that account. The specific reference to the lack of an oath or a verbatim transcript is intended to be illustrative.

Notes of Advisory Committee on Rules—1963 Amendment (citations omitted), 28 U.S.C. at 625.

Nor is there merit to the claim (91-1367 Pet. 16-17, 22-24) that clause (2) of Fed. R. Crim. P. 15(d) disallows foreign depositions unless witnesses are placed under oath, there is a verbatim transcript, and the examination and cross-examination are done directly by counsel. While that clause requires that "the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself," it plainly addresses the method of "examination" rather than the method in which depositions are "taken." As the court explained in *United States* v. *Salim*, 855 F.2d 944, 950-951 (2d Cir. 1988) (emphasis in original; some citations omitted):

> Rule 15(d) begins incorporating the manner of *taking* a deposition in a civil case. It then distinguishes the manner of *examining* a witness, and imposes some additional limitations with respect to the scope and manner of the latter. * * *
>
> Restrictions on the manner in which the deposition is *taken* concern such issues as the person

> before whom the deposition should be taken, how the deposition should be recorded, and how transcripts should be certified and filed. By contrast, the limitation on the scope and manner of *examination* concerns the permissible subject matter and form of the questions, respectively, that may be asked of the witness. This latter provision of the rule appears to require only that the examination and cross-examination be conducted by properly formulated questions in a manner reasonably calculated to elicit admissible testimony. Thus, the additional restriction on *scope* found in Rule 15(d) limits questioning to those matters permitted under Fed. R. Evid. 401, whereas the rule applicable to civil cases permits a much broader inquiry, *see* Fed. R. Civ. P. 26(b). The restriction on the *manner* of examination limits the form of the questions, and concerns such matters as the entitlement to ask leading questions of a hostile witness, *see* Fed. R. Crim. P. 15(d)(2) advisory committee note (1974).

Contrary to petitioner David Sturman's claim (91-1367 Pet. 22-24), there is no conflict among the federal courts of appeals concerning the application of Rule 15. None of the decisions he cites found that a deposition was properly excluded or improperly admitted in evidence, nor has any court held that procedures such as those followed here do not satisfy Rule 15. Indeed, courts have upheld foreign deposition procedures far less protective of defendants' rights than those followed here. For example, *Salim* not only involved the same procedures that petitioner complains about here (*e.g.*, questioning by a French magistrate rather than the attorneys directly, partial summaries by the magistrate rather than a complete verbatim transcription, lack of formal oath) but, in addition, neither defendant nor his counsel were al-

lowed to attend the deposition. See 855 F.2d at 946-952 (describing and upholding procedures). Similarly, in other cases, defendants were not personally allowed to confront the foreign deponents. *E.g.*, *United States* v. *Gifford*, 892 F.2d 263, 264-265 (3d Cir. 1989), cert. denied, 110 S. Ct. 3243 (1990) (absence of incarcerated defendant from Belgian depositions did not violate Rule 15); *United States* v. *Kelly*, 892 F.2d 225, 260-263 (3d Cir. 1989), cert. denied, 110 S. Ct. 3243 (1990) (companion case to *Gifford*).[6] While the exact procedures vary from case to case and from country to country, the federal courts of appeals consistently have interpreted Rule 15 as flexible enough to accommodate those procedural differences.

Nor is there merit to petitioners' claims that taking the Swiss depositions and admitting the deposition testimony were unconstitutional.

a. Petitioner David Sturman argues, for the first time in this Court, that the taking of the Swiss depositions violated his Article III right to have a federal judge preside at all critical stages of his criminal "trial." 91-1367 Pet. 19-21 (citing *Peretz* v. *United*

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[6] Petitioner David Sturman claims that "[t]he Third Circuit has emphasized that the procedures the Third Circuit approves 'are in stark contrast to those approved [by the Second Circuit] in *United States* v. *Salim*' " (91-1367 Pet. 24, quoting *Kelly*, 892 F.2d at 262 n.6). But no Third Circuit (or other federal) case suggests, let alone holds, that the procedures followed in *Salim* are legally inadequate. On the contrary, the Third Circuit in both *Kelly* and the companion case of *Gifford*, like the Sixth Circuit in the present case, cited *Salim* with full approval. The *Kelly* footnote cited by petitioner, far from condemning the *Salim* procedures, simply illustrated that the claim raised in *Kelly* was factually even weaker than the claim rejected in *Salim*.

States, 111 S. Ct. 2661, 2665 (1991)); see *Gomez* v. *United States*, 490 U.S. 858, 876 (1989)). Since no party raised that claim either in the district court or on appeal,[7] this Court should not review it. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

In any event, David Sturman's Article III claim is without merit. United States District Judge George W. White presided at every stage of trial. The decision whether to admit into evidence part or all of the depositions was made at trial solely by Judge White, and the pretrial depositions were not part of the "trial" for Article III purposes. While a Rule 15 pretrial deposition may be a critical stage of the "prosecution" (91-1367 Pet. 19, quoting *Gifford*, 892 F.2d at 265)—in the same sense that a post-indictment police lineup is a critical stage of a prosecution for Fifth and Sixth Amendment purposes (see generally *Kirby* v. *Illinois*, 406 U.S. 682 (1972))—it is not, any more than a post-indictment lineup, a stage of "trial" requiring the presence of an Article III judge.

This Court's recent decision in *Peretz*, rather than supporting the Article III claim, actually undercuts it. The Court in *Peretz* held that "no [Article III] structural protections are implicated" by allowing a magis-

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[7] The trial objections, which were argued and/or adopted by petitioner David Sturman on appeal, were "based upon failure to comply with Rule 15, as well as deprivation of the confrontation clause (Sixth Amendment), a deprivation of due process (Fifth Amendment), a denial of assistance of counsel (Sixth Amendment), and a denial of a fair trial (Fifth and Sixth Amendments)." David Sturman C.A. Br. 49 (citing trial transcript). In addition, David Sturman claimed that the Swiss Supreme Court had barred deposition testimony from being used against him. See *id.* at 49-50. Nowhere, however, did any petitioner claim an Article III violation.

trate to conduct jury selection. 111 S. Ct. at 2669. The Court observed, as it had in a prior decision upholding a magistrate's power to make factual findings and legal recommendations on pretrial motions to suppress evidence, that the "ultimate decision" whether to empanel a jury is made by the district court. *Ibid.* (quoting *United States* v. *Raddatz*, 447 U.S. 667, 683 (1980)). The Article III claim in this case is even weaker than those rejected in *Peretz* and *Raddatz*, because Judge White delegated none of his judicial power to Swiss Magistrate Holdener. Instead, the Swiss magistrate's role in the pretrial collection of evidence was no different for Article III purposes than a police officer's supervision and direction of a critical pretrial lineup.

For similar reasons, there is no merit to petitioner David Sturman's claim (91-1367 Pet. 21-22) that the court of appeals' decision "ignores this Court's holdings that due process requires a disinterested judge." The "disinterested judge" in this case was District Judge White, who presided over all aspects of the trial. Petitioners' due process rights were not violated unless the participation of Swiss Magistrate Holdener, whose alleged conflict of interest was his Swiss-authorized role as both prosecutor and magistrate, rendered the depositions themselves fundamentally unfair and unreliable. Cf. *Manson* v. *Brathwaite*, 432 U.S. 98 (1977) (discussing when procedures underlying pretrial identification may be so unreliable as to violate due process). The courts below properly found, in a factbound determination not warranting further review, that petitioners "failed to establish evidence that Magistrate Holdener's handling of the deposition[s] unfairly prejudiced the defendants or that the testimony could be considered unreliable." Pet. App.

23a; see also C.A. Jt. App. 1984 (district court finding that defense has not "made a case of bias").

b. Petitioner David Sturman also claims, as do petitioners Levine and Kaminsky (91-1533 Pet. 13-18) and petitioner Reuben Sturman (91-1596 Pet. 23-25), that admitting the deposition testimony violated their Fifth and Sixth Amendment rights to examine and confront witnesses. This Court, however, has never interpreted the Constitution to prohibit all out-of-court statements from being admitted at trial. See *White* v. *Illinois*, 112 S. Ct. 736, 744 (1992) ("the admissibility of hearsay statements raises concerns lying at the periphery of those that the Confrontation Clause is designed to address"). On the contrary, hearsay evidence may be admitted without violating the Constitution as long as it bears adequate indicia of reliability. *Idaho* v. *Wright*, 110 S. Ct. 3139, 3146 (1990) (quoting *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980)).[8] Where the evidence falls within a "firmly rooted" hearsay exception, no further showing of reliability is required. *Ibid.*

The hearsay exception under which the deposition testimony was admitted—the ruling allowing "former testimony" of an unavailable witness (Fed. R. Evid. 804(b)(1))—undeniably is firmly rooted. This Court traced the history of the former testimony exception in *Mattox* v. *United States*, 156 U.S. 237 (1895), and more recent cases consistently have held

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[8] A further showing of witness unavailability is necessary where "the challenged out-of-court statements were made in the course of a prior judicial proceeding." *White* v. *Illinois*, 112 S. Ct. 736, 741 (1992) (citing *United States* v. *Inadi*, 475 U.S. 387, 394 (1986)). Petitioners do not dispute that the Swiss witnesses were unavailable to testify at trial.

that hearsay testimony admitted under the former testimony exception satisfies the Confrontation Clause. *Ohio* v. *Roberts*, 448 U.S. at 68-73; *California* v. *Green*, 399 U.S. 149, 165-166 (1970).

Nor is there force to petitioners' suggestion that the Swiss depositions were equivalent to the affidavits that this Court's Confrontation Clause cases condemn. This Court has recognized that "the particular vice that gave impetus to the confrontation claim was the practice of trying defendants on 'evidence' which consisted solely of *ex parte* affidavits or depositions secured by the examining magistrates." *California* v. *Green*, 399 U.S. at 156; see also *White* v. *Illinois*, 112 S. Ct. at 745 (Thomas, J., concurring) (common law right of confrontation originated to curtail evidence obtained through magistrates' interrogation of witnesses at pretrial proceedings in which " '[t]he prisoner had no right to be, and probably never was, present' ") (quoting 1 J. Stephen, *A History of the Criminal Law of England* 221 (1883)). Thus, this Court has never required that former testimony be taken under procedures that exactly mirror the trial setting. See, *e.g.*, *Ohio* v. *Roberts*, 448 U.S. at 72-73; *California* v. *Green*, 399 U.S. at 165-168; *Barber* v. *Page*, 390 U.S. 719, 725 (1968). The fact that petitioners and their counsel were allowed to be present at the deposition means that, unlike most admissions at trial of out-of-court statements under a hearsay exception, petitioners had the opportunity for a "face-to-face encounter" (*Coy* v. *Iowa*, 487 U.S. 1012, 1017 (1988)) with the deponents. In addition, petitioners were permitted, through Magistrate Holdener, to pose whatever questions they wished to the witnesses. Unlike parties against whom hearsay is admitted under other exceptions, petition-

ers thus had the opportunity to cross-examine the deponents.[9]

Petitioners' specific objections to the procedures followed in the Swiss depositions also lack merit. Particularly unavailing is petitioners' objection to the lack of a verbatim transcript, because it was petitioner David Sturman's own Swiss attorneys who objected to the government's suggestion that videotape be used and an American court reporter be present. See Gov't C.A. Br. 93 & n.94.[10] In any event, evidence admitted under the former testimony exception traditionally was introduced by a witness recounting the substance of the prior testimony in cases in which a stenographic transcript was unavailable.[11] See, *e.g.*, *Ruch* v. *Rock Island*, 97 U.S. 693, 694 (1878).[12] Nor did the procedures by which the ques-

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[9] Magistrate Holdener excluded only one question, concerning the salary of one of the witnesses, and petitioners have not asserted that that single exclusion prejudiced them in any way.

[10] David Sturman's Swiss attorney, in objecting to the Swiss government's order that the deposition be held, stated:

> [I]t should be noted that the use of a videotape, as asked for in the request for judicial assistance, is not provided for by the Zurich Code of Penal Procedure and is, therefore, illegal and that the presence of a US court reporter is contrary to art. 271 of the Swiss Penal Code.

C.A. Jt. App. 958.

[11] Given that former testimony may be proved by a witness simply recounting what the declarant said, petitioners' unsupported contention (91-1367 Pet. 27) that the former testimony exception requires a verbatim transcript is mistaken. See 4 D. Louisell & C. Mueller, *Federal Evidence* § 487, at 1079 (1980).

[12] Petitioner's claim (91-1367 Pet. 27-28), raised for the first time in this Court, that the lack of a verbatim transcript

tions were posed to and answered by the witnesses render their testimony so "inherently unreliable" that the Confrontation Clause was violated. See *United States* v. *Salim*, 855 F.2d at 954-955 (rejecting Confrontation Clause challenge to foreign depositions taken in similar manner). The jury was entitled to weigh the procedural context in its consideration of the depositions because the district court instructed that the Swiss judicial system operates "a lot differently" than our system (C.A. Jt. App. 2001) and specifically pointed out that the deposition readings would reflect that the witnesses were permitted to correct and add to their answers (*id.* at 2006).

Equally without merit is petitioners' challenge to the absence of a formal oath. Each witness was admonished by the Swiss magistrate that, while Switzerland does not recognize the oath, a witness who "intentionally makes a false statement * * * will be punished [under Swiss law] with a term of up to five years in the penitentiary or imprisonment." See C.A. Jt. App. 2002. Like an oath administered to American witnesses, that admonition was "in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to [testify truthfully]." Fed. R. Evid. 603.

Finally, review of the Swiss deposition issue is not warranted because any error, constitutional or otherwise, was harmless beyond a reasonable doubt. See Gov't C.A. Br. 95 n.98, 126-136. Although petitioners quote pre-disposition statements of the prosecutor

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violated the Court Reporters Act (28 U.S.C. 753(b)) is constitutionally irrelevant and statutorily wrong. That Act applies only to "session[s] of the court" and other specifically designated court proceedings; it has never been interpreted to extend to out-of-court proceedings such as depositions.

regarding the government's need for the depositions (91-1367 Pet. 3-8), those predictive statements do not preclude a court from later reviewing the entire record with the benefit of hindsight to determine whether admission of the evidence can be said to have been harmless. In this case, petitioners ultimately were linked to the Swiss accounts by "[v]olumes of business records from seven foreign banks" that independently were admitted pursuant to a statute authorizing admission of foreign business records (18 U.S.C. 3505). See Pet. App. 39a-42a. Indeed, the lead defense counsel at trial told the district court that "for reasons which are a mystery to me, the government only asked [the Swiss deponents] to address a handful of documents compared to the documents which, once this trial began, the government offered into evidence pursuant to 18 U.S.C. Section 3505." C.A. Jt. App. 1987. In light of that far more substantial evidence linking petitioners to the conspiracy, any error in the admission of the deposition evidence was clearly harmless.

3. Petitioners Levine and Kaminsky (91-1533 Pet. 18-22), as well as petitioner Reuben Sturman (91-1596 Pet. 13-17), seek further review of their claim that 18 U.S.C. 3505, which governs the admissibility of foreign business records, violates the Confrontation Clause. Section 3505 allows the admission of foreign business records if a custodian certifies that they are kept in the regular course of business and if they meet other specified requirements "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The constitutionality of Section 3505 has been upheld by other courts, and this Court has denied certiorari in a case raising the issue. See *United States* v. *Miller*,

830 F.2d 1073, 1076-1077 (9th Cir. 1987), cert. denied, 485 U.S. 1033 (1988); *United States* v. *Davis*, 767 F.2d 1025, 1031-1032 (2d Cir. 1985); *United States* v. *Hing Shair Chan*, 680 F. Supp. 521, 522-526 (E.D.N.Y. 1988).

This Court has approved one commentator's observation that "[p]roperly administered the business and public records exceptions would seem to be among the safest of the hearsay exceptions." *Ohio* v. *Roberts*, 448 U.S. at 66 n.8. Petitioners claim that their Confrontation Clause rights were nonetheless violated because the records in this case were authenticated by affidavits of foreign custodians. Authentication of foreign business records, however, is a threshold matter for the court rather than the jury, and the normal restrictions on hearsay evidence do not apply. 18 U.S.C. 3505(b); Fed. R. Evid. 104(a); see generally *United States* v. *Tedder*, 801 F.2d 1437, 1448 (4th Cir. 1986), cert. denied, 480 U.S. 938 (1987). In any event, hearsay statements of unavailable witnesses may be admitted without violating the Constitution, as long as they bear adequate indicia of reliability. *Idaho* v. *Wright*, 110 S. Ct. at 3146; *Ohio* v. *Roberts*, 448 U.S. at 66. Section 3505 is coterminous with the Constitution in this regard, in that it expressly excludes foreign records where "the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The courts below correctly determined that the certificates of the foreign custodians, which contained acknowledgments that the makers were subject to penalties under Swiss law for giving false testimony, contained adequate indicia of reliability. To the extent petitioners wished to challenge the authentications, moreover, they were free to do so during the Swiss depositions of record custodians.

4. Petitioner Reuben Sturman seeks further review in No. 91-1596 of numerous additional claims.

a. First, petitioner claims (Pet. 18-22) that he was entitled to review the government's 1981 submission to Swiss authorities in order to determine whether the government obtained Swiss bank records by accusing petitioner of being an organized crime figure. According to petitioner, such an accusation, which would have been false, allowed the government to obtain bank records to which it otherwise was not entitled under the Mutual Assistance Treaty, U.S.-Switz., 27 U.S.T. 2019, T.I.A.S. No. 8202 (1973) (*reprinted in* part at 91-1596 Pet. App. 134a-142a). Both courts below reviewed the government submission and concluded it was not false. See Pet. App. 30a. But petitioner would have no standing to challenge the transfer and admission of documents even if the government's 1981 submission was false. Article 37 of the Treaty expressly provides, with certain exceptions not applicable here, that:

> The existence of restrictions in this Treaty shall not give rise to a right on the part of any person to take any action in the United States to suppress or exclude any evidence or to obtain other judicial relief in connection with requests under this Treaty.

See Pet. App. 27a. A defendant thus lacks standing to suppress evidence obtained pursuant to the Treaty or to obtain judicial relief for alleged violations of the Treaty, or matters arising under it. *United States* v. *Davis*, 767 F.2d 1025, 1029, 1030 (2d Cir. 1985); *United States* v. *Johnpoll*, 739 F.2d 702, 714 (2d Cir.), cert. denied, 469 U.S. 1075 (1984); *Cardenas* v. *Smith*, 733 F.2d 909, 917-919 (D.C. Cir. 1984).[13]

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[13] *Cardenas*, which involved the seizure of Swiss bank accounts in which the plaintiff had an interest, recognized that

b. Second, petitioner claims (Pet. 25-27) that the district judge should have recused himself because, after petitioner was sentenced, the judge acknowledged his personal dislike of the pornography business and stated, "I have gone out of my way, very frankly, as a judge to separate in my mind the business that the defendants are in from what they are charged with." See Pet. App. 24a n.6 (quoting district court's comments). There is no merit to petitioner's suggestion (Pet. 26-27) that the court of appeals failed to apply the objective standard required under 28 U.S.C. 455 to determine whether a judge should be recused. The court of appeals quoted the statute as requiring a federal judge to recuse himself "in any proceeding in which his impartiality might reasonably be questioned" (28 U.S.C. 455(a)) and quoted its own prior case law as requiring a "determin[ation] whether a reasonable, objective person, knowing all the circumstances, would not have questioned [the judge's] impartiality." Pet. App. 25a (internal quotations omitted). The court of appeals' case-specific conclusion that the district judge's brief remarks at the close of a protracted proceeding would not cause a reasonable person to question the judge's impartiality is correct and does not warrant further review.

c. Next, petitioner claims (Pet. 27-28) that it was error for the court to impose consecutive fines on

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the Treaty cannot deprive an individual of constitutional rights. See 733 F.2d at 919. The court of appeals held (Pet. App. 28a), however, that petitioner had no constitutional right of privacy in his foreign accounts and that any privacy right "and any remedy given for a violation of that right is limited by the terms of the Treaty." Cf. *United States* v. *Miller*, 425 U.S. 435 (1976).

certain counts because the crime of filing a false income tax return (26 U.S.C. 7206(1)) is a lesser-included offense of attempted tax evasion (26 U.S.C. 7201). Filing a false income tax return is not a lesser-included offense of attempted tax evasion in the traditional sense, however, because tax evasion may be committed without even filing a tax return, and filing a false return may not result in evasion of any tax properly owed. See generally *Spies* v. *United States*, 317 U.S. 492, 499-500 (1943). Some courts have nonetheless held that cumulative punishment should not be imposed if proving the evasion of tax proves the false statement (usually an understatement of income) on the return. See Pet. 28 (citing cases). The court of appeals in this case did not reject the holdings in those cases, but instead distinguished them on the same ground as an earlier court had under facts identical to this case. See Pet. App. 36a-37a (following *United States* v. *Franks*, 723 F.2d 1482, 1487 (10th Cir. 1983), cert. denied, 469 U.S. 817 (1984)). *Franks* held that, because proof that a taxpayer evaded paying taxes does not prove that he misrepresented his control over foreign bank accounts, consecutive punishments may be imposed in such a case. That holding is not inconsistent with cases reaching a different result on different facts.

d. Finally, petitioner asks (Pet. 28-29) this Court to consider whether the reporting requirements of the Bank Secrecy Act, 31 U.S.C. 5311 *et seq.*, and its implementing regulations violate the Fifth Amendment privilege against compulsory self-incrimination. The specific statutes and regulations that petitioner violated require taxpayers to report financial interests in, or signature authority over, foreign bank accounts. See 31 U.S.C. 5314; 31 C.F.R. 103.24. The

court of appeals' decision is consistent with decisions of this Court and does not conflict with the decision of any other court.

This Court has held that the Fifth Amendment privilege against compulsory self-incrimination does not allow taxpayers to refuse to answer questions on tax forms merely because the responses may lead the government to uncover illegal sources of income or tax fraud. *United States* v. *Sullivan*, 274 U.S. 259 (1927). Since the "Bank Secrecy Act applies to all persons making foreign deposits, most of whom do so with legally obtained funds" (Pet. App. 36a), the court of appeals properly distinguished decisions of this Court holding unconstitutional those statutes requiring self-incrimination solely of a "selective group inherently suspect of criminal activity." *Marchetti* v. *United States*, 390 U.S. 39, 47 (1968) (statute requiring reporting and taxing of illegal gambling activities); *Grosso* v. *United States*, 390 U.S. 62 (1968) (similar). Here, as in *Sullivan* and more recent cases of this Court rejecting Fifth Amendment challenges to reporting requirements, the tax form questions "were neutral on their face and directed at the public at large." *California* v. *Byers*, 402 U.S. 424, 429, 433-434 (1971); see also *Selective Service System* v. *Minnesota Public Interest Research Group*, 468 U.S. 841, 858 n.16 (1984) (in rejecting Fifth Amendment claim, Court distinguished *Marchetti* and *Grosso* on ground that "anyone who asserted the privilege on a wagering return did not merely call attention to himself; the very filing necessarily admitted illegal gambling activity").

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1991

REUBEN STURMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF OF PETITIONER

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ARGUMENT IN REPLY

I. AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER 18 U.S.C. § 3505 VIOLATES THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT BECAUSE IT PERMITS AN ACCUSED TO BE TRIED ON THE BASIS OF *EX PARTE* AFFIDAVITS.

The government defends its use of *ex parte* affidavits to lay the foundation for admitting foreign business records into evidence on the apparent ground that the Confrontation Clause simply does not apply to foundation evidence that must be elicited before other evidence may be admitted at trial. Gov't Br. at 23-24. Such a proposition, however, finds no support in the language of the Sixth Amendment itself, which provides that, "In all criminal prosecutions, the accused shall enjoy the right . . . *to be confronted with the witnesses against him.* . . . " (Emphasis added). There can be no doubt that the affiants in this case were witnesses against the accused, indeed critical witnesses, for without their testimony the records upon which petitioner's entire prosecution was based could never have been admitted into evidence. There can further be no doubt, as conceded by the government, that the affidavits at issue were collected by the prosecution in anticipation of trial on an *ex parte* basis – the precise evil which, at its core, the Confrontation Clause was designed to prevent. *White v. Illinois*, ___ U.S. ___, 112 S. Ct. 736, 740-41 (1992). The government's proposition, therefore, can find no support in the policy underlying the Sixth Amendment right to confront witnesses either.[1] Thus, the suggestion

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[1] Nor does the government's proposition find any support in Rule 104(a), Fed. R. Evid., which could not, and has never been interpreted to abrogate a defendant's constitutional right to confront witnesses against him. The government's citation to *United States v. Tedder*, 801 F.2d 1437, 1448 (4th Cir. 1986), *cert. denied*, 480 U.S. 938 (1987), seemingly in support of its proposition that confrontation of foundation witnesses is not required, is puzzling. The court's holding in *Tedder* was merely that the defendant there had waived any objections he might have had to the admission of records under § 3505. *Tedder* did not even mention the Confrontation Clause or Rule 104(a).

that the Confrontation Clause does not apply to those parts of a federal criminal felony trial where critical, essential foundation testimony is elicited is untenable.

Equally without merit is the government's argument that the procedures of § 3505 do not run afoul of the Sixth Amendment because the business records exception to the hearsay rule is "firmly rooted" and among the safest of the hearsay exceptions. This case is simply not a challenge to that rule. Rather, the question presented here is whether Congress can enact legislation exempting one class of witnesses from testifying in open court and from being subjected to cross-examination. The class of witnesses exempted from testifying in open court under § 3505 happens to be those who would provide foundation testimony for the admission of business records. That happenstance, however, does not bring into question the legitimacy of the exception to the hearsay rule for business records any more than a law allowing affidavits, instead of live testimony, to identify and lay the foundation for admitting into evidence the weapon used in a murder or an eyewitness identification would raise questions about the constitutional efficacy of admitting murder weapons or eyewitness identifications into evidence at criminal trials.

Nor is there any merit to the implication of the government's entire argument that face-to-face confrontation would be of no value in this case because the testimony merely related to the foundation for business records. On the contrary, confrontation of these important witnesses, as with any other witnesses in any other context, serves a vital role. First, cross-examination would give a defendant the opportunity to raise serious questions about the identity, creation, maintenance, authenticity or trustworthiness of the business records at issue, and, of equal importance, may well shed important light on the meaning and significance of the contents of the records and the transactions allegedly reflected by them. An effective cross-examination could lead to the outright exclusion of the records sought to be admitted. Failing that, an effective cross-examination could lead the jury to reduce the

weight it ultimately gives to either the foundation testimony or the records admitted pursuant to such testimony.[2]

II. IMPORTANT QUESTIONS ARE PRESENTED BY THE DECISION BELOW THAT, EVEN IF THE JUSTICE DEPARTMENT SUBMITTED KNOWING OR RECKLESS FALSEHOODS ABOUT A CITIZEN IN A REQUEST FOR INVESTIGATIVE ASSISTANCE UNDER AN INTERNATIONAL TREATY, THIS DOES NOT GIVE RISE TO CLAIMS UNDER THE FOURTH AND FIFTH AMENDMENTS SUFFICIENTLY COLORABLE TO ENTITLE THAT CITIZEN TO DISCOVER THE TREATY REQUEST.

The government attempts to mask over the enormity of the error committed by the Court of Appeals in deciding whether the secret charges that petitioner was involved in organized crime were true. Gov't Br. at 25. For what happened below is conceptually no different than this: In 1981, a secret indictment is returned charging petitioner with being knowingly involved in important criminal activities of an organized criminal group. Thereafter, he is never permitted to see the charge, let alone defend against it. Ten years later, a panel of appellate judges – who were not witnesses to and had no personal knowledge of the events in question, and who did not even have an evidentiary record before them – pronounce that the charges are true and petitioner is guilty. This is the essence of what the Court of Appeals did in this case.

By relying on Article 37 of the Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, United States-Swiss Confederation, 27 U.S.T. 2019, T.I.A.S. 8302, the government

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[2] The government further states that, "[t]o the extent petitioners wished to challenge the authentications, moreover, they were free to do so during the Swiss depositions of record custodians." Gov't Br. at 24. The problem with this assertion is that none of the affiants who signed the twelve certificates of authenticity, nor the individual who was interviewed, were among the four witnesses deposed in Switzerland. Petitioner could hardly have cross-examined the deposed witnesses about statements contained in affidavits they did not sign.

also mischaracterizes the nature of petitioner's claims. Gov't Br. at 25. Article 37 has no application to this case, because the issues raised by petitioner do not have their source in the Mutual Assistance Treaty, but in the Constitution. As the court in *Cardenas v. Smith*, 733 F.2d 909, 917-19 (D.C. Cir. 1984) expressly held, Article 37 does not stand as a bar to constitutional claims, but, rather, is limited to claims arising under the Treaty.[3] Here, as argued in his opening brief, petitioner's claims are rooted in the Fourth and Fifth Amendments to the Constitution, not the Mutual Assistance Treaty.

III. IMPORTANT QUESTIONS ARE PRESENTED BY THE DECISION OF THE COURT BELOW APPROVING THE USE OF THE SWISS DEPOSITION SUMMARIES.

While on page 18 of its brief the government responds to petitioner David Sturman's claims that District Attorney Holdener's bias tainted the Swiss deposition proceedings, the government entirely ignores petitioner Reuben Sturman's claims that his rights to due process and a fair trial were denied when the Swiss depositions were presided over by Holdener. Gov't Br. at 18. This oversight is particularly curious since it is petitioner Reuben Sturman who is in the strongest position of all to challenge the entire Swiss proceedings. For it was *petitioner* who District Attorney Holdener caused to be unlawfully arrested on an unfounded suspicion of a violation of Swiss law; it was *petitioner* who was interrogated by the District Attorney, who ultimately had to release petitioner with a begrudging apology; and it was *petitioner* who was the focal point of the District Attorney's involvement in the investigation and prosecution of this very case. The Swiss prosecutor who presided over the depositions had demonstrated bias against petitioner Reuben Sturman, and yet the government makes no effort to address his claims. These

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[3] The government cites to *Cardenas* as though it supports the government's position in this case, but any fair reading of that case proves otherwise.

facts present serious questions concerning Rule 15, Fed. R. Crim. P., due process and fundamental fairness, deserving of this Court's attention.

IV. THE COURT OF APPEALS HAS EFFECTIVELY REENACTED A SUBJECTIVE STANDARD FOR RECUSAL OF FEDERAL JUDGES IN DIRECT CONTRAVENTION OF 28 U.S.C. § 455 AND THIS COURT'S PRECEDENTS.

Contrary to the government's claim that there is no merit to petitioner's argument that the Court of Appeals failed to apply an objective standard, as required by 28 U.S.C. § 455, *see* Gov't Br. at 26, there are numerous factors which demonstrate that that is precisely what the court did. The Court of Appeals, for instance, accepted the trial judge's assertion that he had tried to set his feelings aside, which is a wholly inappropriate consideration under the objective standard created by § 455. Moreover, the Court of Appeals would have had petitioner prove, in the form of reversible error on appeal, that he had suffered actual prejudice directly attributable to the judge's bias. Pet. Cert. at A.25a. Again, § 455, by its plain language, does not place such an onerous burden on petitioner. Further, the court noted that it found no fault with the judge's sentence, another wholly irrelevant consideration under § 455.

Not only did the Court of Appeals impose an inapplicable and onerous burden on petitioner to demonstrate actual bias which took the form of reversible error on appeal, but the Court of Appeals completely ignored the fact, brought to its attention by petitioner, that the trial judge's first act in this case amounted to reversible error: imposing a $3,000,000 cash bond which the judge refused to lower upon petitioner's motion, but which was lowered by a different panel of the Court of Appeals to $100,000 in an opinion criticizing the trial court for imposing such a bond *ex parte*.

V. THIS COURT SHOULD RESOLVE A CONFLICT AMONG THE CIRCUITS AS TO WHETHER A CHARGE OF FILING A FALSE TAX RETURN UNDER 26 U.S.C. § 7206(1) IS A LESSER-INCLUDED OFFENSE OF A CHARGE OF ATTEMPTED TAX EVASION BY FILING A FALSE RETURN UNDER 26 U.S.C. § 7201.

Five Circuit Courts of Appeals have held, *without qualification*, that the crime of filing a false tax return under 26 U.S.C. § 7206(1) is a lesser-included offense of attempted tax evasion under 26 U.S.C. § 7201, where the affirmative act of evasion charged is the filing of a false tax return. *United States v. Kaiser*, 893 F.2d 1300, 1305-07 (11th Cir. 1990); *United States v. Citron*, 783 F.2d 307, 312 (2d Cir. 1986), *following remand*, 853 F.2d 1055 (2d Cir. 1988); *United States v. White*, 417 F.2d 89, 93-94 (2d Cir. 1969), *cert. denied*, 397 U.S. 912 (1970); *United States v. Pulawa*, 532 F.2d 1301, 1302 (9th Cir. 1976); *United States v. Lodwick*, 410 F.2d 1202, 1206 (8th Cir.), *cert. denied*, 396 U.S. 841 (1969); *Gaunt v. United States*, 184 F.2d 284, 290 (1st Cir. 1950), *cert. denied*, 340 U.S. 917 (1951). This is because proof of attempted tax evasion which is premised upon the filing of a fraudulent return necessarily proves that the defendant filed a fraudulent return. Further without qualification, those courts have held that imposing consecutive punishment for such crimes accordingly would be unconstitutional.

Two Courts of Appeals have held, however, that this is not always so, notwithstanding the fact that proof of attempted tax evasion on such a theory necessarily proves the filing of a fraudulent return. Rather, those courts have held that consecutive sentences can be imposed so long as more than one falsehood is contained in the tax return. *United States v. Sturman*, 951 F.2d 1466 (6th Cir. 1991); *United States v. Franks*, 723 F.2d 1482, 1486 (10th Cir. 1983), *cert. denied*, 469 U.S. 817 (1984). This is not a mere distinction, as the government suggests, but an absolute conflict. For, no matter how many falsehoods are contained in any given tax return, § 7206(1) can only be violated once in any given tax

year and proof that the accused evaded taxes by the filing of a false return will always prove that lesser offense.

VI. THIS IS AN IDEAL CASE TO CONSIDER THE ISSUE RESERVED BY THIS COURT NEARLY TWENTY YEARS AGO IN *CALIFORNIA BANKERS ASSOCIATION V. SHULTZ,* 416 U.S. 21 (1974): WHETHER PROVISIONS OF THE BANK SECRECY ACT AND REGULATIONS PROMULGATED THEREUNDER, ARE UNCONSTITUTIONAL UNDER THE SELF-INCRIMINATION CLAUSE OF THE FIFTH AMENDMENT.

The government, in attempting to make short shrift of this issue, completely ignores the fact that this Court reserved this specific issue in *California Bankers Association v. Shultz,* 416 U.S. 21 (1974); indeed, the government does not even cite to *California Bankers.* Moreover, the government makes no reference to the specific facts of this case – that is, a pending grand jury investigation of petitioner concerning the precise information required to be disclosed by the Bank Secrecy Act, 31 U.S.C. §§ 5311 *et seq.* – which render this case a particularly appropriate vehicle for this Court finally to resolve the issue reserved in *California Bankers.*

VII. AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER THE "DEFRAUD CLAUSE" OF 18 U.S.C. § 371 MAY BE USED TO PROSECUTE AN AGREEMENT TO ENGAGE IN CONDUCT WHICH CONGRESS HAS DETERMINED IS NOT CRIMINAL.

The government, like the two courts below, again refuses to address the real issue presented by this case: Did Congress, when it amended 26 U.S.C. § 7206(4) in 1954 to make post-assessment concealment of assets, income and sources of income a crime, decide that the preassessment concealment of assets, income and sources of income is not a crime? If so, the question presented by this case is whether the preassessment concealment of assets, income and sources of income (which

is all that Count I charged in this case) can be prosecuted as a crime under the defraud clause of 18 U.S.C. § 371.

CONCLUSION

For all the reasons set forth above, this Court should grant petitioner's request for a writ of certiorari and accept this case for review.

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